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JAMES W. LATTI, SECRETARY.

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THE LEGAL RELATIONS

BETWEEN THE

Employed and their Employers

IN PENNSYLVANIA,

COMPARED WITH THE

Relations Existing Between them in Other States,

BY PROFESSOR ALBERT S. BOLLES.

Supplement to the 28th Annual Report of the Bureau of Industrial Statistics.

JAMES M. CLARK,
Chief of Bureau.

WM. STANLEY RAY,
STATE PRINTER OF PENNSYLVANIA.
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DEPARTMENT OF INTERNAL AFFAIRS, JAMES W. LATTI, SECRETARY.

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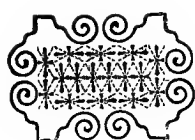
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5. A person to whom an employer delegates his duty to supply machinery and appliances, make repairs, furnish suitable places for work and proper materials and instructions is not a fellow-servant.
 - a. The employer's agent who selects machinery and appliances is not a fellow-servant.
 - b. Nor his agent who furnishes places for employes.
 - c. Or selects employes.
 - d. Or makes repairs.
 - e. Or in many cases an inspector.
 - f. Or a train dispatcher.
 - g. Or an agent who gives instructions.
6. A person may serve at the same time in the double capacity of an agent or representative of his employer and also as a fellow-servant.

7. A person who has authority to hire, pay, direct and discharge men is not a fellow-servant.

8. An employe who controls or directs the employment of another is in some states a fellow-servant; in others he is not.

9. In some states, servants, whether of the same or different rank, deriving authority from the same employer and engaged in the same business, even though in different departments, are fellow-servants.

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THE LEGAL RELATIONS EXISTING BETWEEN EMPLOYERS AND THEIR EMPLOYEES.

CHAPTER I.

THE GENERAL RULE OF LIABILITY.

1. Courts are often required to determine the liability of employers to their employes for accidents happening while in their employment. In consequence of the wide diversity of industries, and the great development of industrial organizations during the last fifty years, many of the rules thus established by the courts cannot be easily applied, and, consequently, form uncertain and often difficult guides, both for employed and employers. In a very recent case (1) it was remarked that after all that had been written and spoken on the subject, it was still a difficult question to decide who was a fellow-servant. "Each case in the future, as heretofore, will have to be determined by its own particular facts." Every member of society is supposed to know the law, and, consequently, is held liable for any violation thereof; what, therefore, can be said of a system of law under which the ordinary rights and liabilities of those for whom it is designed cannot be clearly known until a court has determined in each particular case what they are? The least that can be said is that a legal system so radically defective is in great need of amendment. It is proposed therefore to show, as far as we may be able, what are the legal relations between employed and employers, for the double purpose of enabling these classes especially to gain a better understanding of them, and also to prepare the way for improving the law by statutory or other amendment.

2. It is one of the most fundamental of all legal rules that a man is not liable for the wrongs done by another. This is in harmony

(1) *Ward v. Odell Mfg. Co.*, 36 S. E. Rep. 194, 196.

with the judgment of mankind, for there is no more reason in holding B liable for the wrongs of A, than in requiring B to pay A's debts. This is too plain to require further discussion.

3. To this rule, however, there is an ancient exception. A master is liable for the wrongful and negligent acts of his servant that are done within the scope of his employment and while pursuing his master's business. This is known as the doctrine of respondeat superior. In the Roman law this doctrine was properly applied to the head of a family, because no action could be brought against his son or slave for his act or default. By the American and English law an employe is liable for his own act or default, consequently it has been said that the maxim respondeat superior, except by analogy, can have no place in a system of jurisprudence under which citizens have equal personal rights and liabilities.

4. This rule may be illustrated by describing the case of a railway engineer who rode by permission of a brakeman in one of the company's cars. Before finishing his journey he was killed, and his wife attempted to recover a money damage from the company. It defended on the ground that the brakeman, even though negligent in fulfilling the duty for which he had been employed, was acting entirely outside his province in permitting the engineer to ride, and, therefore, the company was not responsible for his act. Justice Danforth, in delivering the opinion of the court, declared that the law, for reasons of convenience, made a master liable for the act of his servant, even though, while performing the duty, he was guilty of a deviation, or of a failure to perform it in the safest and best manner. But when a servant, "instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and, therefore, is not responsible for the negligence of his servant in doing it." In other words, when the master has neither ordered the thing to be done, nor allowed the servant any discretion in the mode of doing it, neither in common justice, nor common sense, can the master be held responsible. In the case before the court the brakeman was never told, or authorized to carry any person, and if he consented to the engineer's going into the car, there was no evidence that in doing so he was acting in the line of his duty, or within the scope of his employment (2).

5. This ancient rule of respondeat superior was applied without exception until 1837. In that year Lord Abinger decided the famous case of *Priestley v. Fowler* (3), which has flooded England and America with more legal decisions than any other judicial deliverance in the vast domain of English and American jurisprudence.

(2) *Morris v. Brown*, 111 N. Y., 318, 328.

(3) 3 Exch. 1.

What is the history of this controversy which has so long vexed the courts and cannot be settled? A butcher named Fowler employed Priestley, and, on the occasion of the accident which kindled this unending source of litigation, requested him to go with some goods in a van belonging to himself, conducted by another servant. Priestley went as requested, but the van was overloaded and broke down, and Priestley was thrown off, sustaining severe injuries. He sued Fowler, and the court decided, Lord Abinger rendering the decision, that he was not liable. The reasoning on which this decision was founded may be given:

"If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is, therefore, responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coachmaker, or his harnessmaker or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coachmaker, or for a defect in the harness, arising from negligence of the harnessmaker, or for drunkenness, negligence or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him in a damp bed; for that of the upholsterer for sending in a crazy bedstead; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to the health; of the builder for a defect in the foundation of the house, whereby it fell and injured both the master and the servant by the ruins. The inconvenience, not to say the absurdity, of these consequences, affords a sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of the master and the servant can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is no doubt bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as his master."

6. It may be noted that Lord Abinger's chief argument for his decision was a presentation of the absurd consequences that might flow from the adoption of the opposite rule. The argument has been characterized by an eminent jurist and legal writer, Judge Redfield, as a "most ingenious attempt at *reductio ad absurdum*, where the learned Chief Baron, among other ingenious speculations, supposes some fearful consequences if the master were to be held liable for the negligence of the chambermaid in putting the servant into wet sheets." (4)

7. In the United States this question was first answered by the Supreme Court of South Carolina, in *Murray v. South Carolina R. Co.* (5) The decision was rendered only a year after the Priestley case, and the American judges knew nothing of the English decision at the time of rendering their own. The *Murray* suit was brought by a fireman for an injury caused by the negligence of an engineer with whom he was associated in running an engine. The reasoning of the court in this case may be briefly given. In a concurring opinion Chancellor Johnson remarked: "The foundation of all legal liability is the omission to do some act which the law commands, the commission of some act which the law prohibits, or the violation of some contract by which the party is injured. There is no law regulating the relative duties of the owners of a steam car, and the persons employed by them to conduct it. The liability, if any attaches, must thereafter arise out of contract. What was the contract between these parties? The plaintiff, in consideration that the defendants would pay him so much money, undertook to perform the service of fireman on the train. This is all that is expressed. Is there anything more implied? Assuming that the injury done was in consequence of the negligence of the engineer, the defendants would not be liable unless they undertook to answer for his diligence and skill. Is that implied? I think not. The law never implies an obligation in relation to a matter about which the parties are or may, with proper diligence, be equally informed. No one will ever be presumed to undertake for that which a common observer would at once know was not true. The common case of a warranty of the soundness of a horse, notoriously blind, may be put in illustration. The warranty does not extend to the goodness of the eyes, because the purchaser knew, or might have known, with proper care, that they were defective. Now, the plaintiff knew that he was not to conduct the train alone. He knew that he was to be placed under control of the engineer. He knew that the employment in which he was engaged was perilous, and that its success was dependent upon the common efforts of all the hands,

(4) Redfield on Railways, 566; 6th Ed.

(5) 1 McMullan, 385.

and with proper diligence and prudence he might have been as well, and it does not follow that he might not have been better informed, than the defendants, about the fitness and security of all the appointments connected with the train. If he was not, it was his own want of prudence, for which defendants are not responsible. If he was, he will be presumed to have undertaken to meet all the perils incident to the employment."

8. Four years afterward, in 1842, the question came before the highest court of Massachusetts (6), in the case of an engineer who sued to recover for an injury occasioned by the carelessness of a switch-tender employed by the company. The reasoning of Chief Justice Shaw has been so generally followed by other courts that it will be presented:

"In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer."

9. The question was not raised before the Supreme Court of Pennsylvania until 1854, when *Ryan v. Cumberland Valley R.* was decided (7). Ryan and several others were employed by the company to repair their road, and in doing so used gravel dumping cars that were moved by locomotive power. Ryan boarded in Chambersburg, four miles distant from his place of work and was injured by the dumping of a car while riding therein from his work. He maintained that it was the duty of the engineer or conductor to have secured the car properly before starting. The opinion of the court

(6) *Farwell v. Boston & Worcester R.*, 4 Met. 49.

(7) 23 Pa. 384.

was delivered by Justice Lowrie. After remarking that Ryan did not sue in the relation of a passenger, but as a servant injured by the carelessness of a fellow-servant, he proceeded to discuss the grounds of recovery. The judge continued:

"This alleged duty did not grow out of any contract between the plaintiff and the defendants, else the contract would have been charged as an essential and relevant bond of their relation, which has not been done. If it was a duty which the engineer owned to the plaintiff in any way, then the action ought to be brought against him for the breach of it. If he owed it to the defendants, then they alone can complain of its non-performance. The duty must, therefore, be alleged as that of the defendants to the plaintiff. In what form shall we put it, or how shall we define it? Is it that, when persons are employed to work for others, the employers are bound to see that the instruments of their work are and shall continue in a condition to be used with safety? Then the coachman, the wagoner and the carter, who ought to know more about the vehicles which they use than their employers do, have a practical warrantry that they are in good order, though practically we know that many of them are nearly worn out; the wood-chopper and the grubber are insured that their axe or mattock shall not injure them by flying off the handle; the engineer, the miller, the cotton-spinner, and the wool-carder have a guarantee for the accidents that may befall them in the use of the machinery which they profess to understand, and which they ought so to understand as to be able to inform their employers when it is out of order.

"If this be so, then the care and skill required of workmen is reduced very much below what is ordinarily expected of them. If there be any distinction between any of the cases put and the one in hand it is too narrow to be made the foundation of a new rule, or to cancel the force of the analogy which they afford. Certainly such a duty has never been considered as belonging to these relations, and, therefore, it cannot be law.

"The only way left for defining the supposed duty is to allege that employers are liable when any of those employed by them are injured by the carelessness of their fellow laborers. Though this proposition has never been decided upon by this court, it has often been considered elsewhere and decided in the negative, and we know but one case which seems to affirm it.

"But it must be conceded that many of the relations of life are instituted in the most general terms, and that the special duties of each party are so well understood in society that they are left entirely undefined in the contract, and each is presumed to have undertaken them without their being formally specified. Certainly no one will pretend that the duty here insisted upon has in any

way become part of this contract, for no one so understands it, and no one would so contract if requested.

"There is, therefore, no way left but to allege that the law has made it a duty of a master to see that his servants do not injure each other by their carelessness. There is no statute of this purport, and, therefore, the allegation must be that it is a part of the common law. But the common law consists of the general customs of the people, and of the maxims and principles on which they act, and it is conclusive against the rule contended for that it has never been found among these, and is not deducible from them.

"But the duty insisted upon is substantially one of protection, which cannot exist without implying the correlative one of dependence or subjection. The relations of husband and wife, parent and child, are in law relations of protection and dependence; and there are those which are so in fact, as where a weak-minded person submits himself to the direction of another, and here the law interferes to protect against an undue exercise of influence and power. And there are others, as the Sunday laws and the laws regulating the hours of labor in particular occupations, whereby the law protects men against the danger arising from undue competition; but the strictness used in defining this relation, as belonging to special cases, implies that it has no wider existence.

"There is no relation of protection and dependence between master and servant, or of confidence in the institution of the relation; we speak not of master and apprentice. The master is no Roman client or feudal villain, with a lord to protect him. Both are equal before the law, and considered equally competent to take care of themselves, and very often the servant is the more intelligent of the two.

"The argument that the law implies a warranty that one servant shall not be injured by the carelessness of another, is only another way of stating the proposition that the law imposes the duty of protection, and it must be set aside by the same answer.

"And what would be the value of such a rule? If it exists at all, it must grow out of the relation and affect all persons standing in it; and this would change all our ideas concerning the relation of master and servant. Every man must have his own business, whether as master or as servant, and there is no business without its risks. Where many servants are employed in the same business, the liability to injury from the carelessness of their fellows, is but an ordinary risk, against which the law furnishes no protection but by an action against the actual wrongdoer. It would violate a law of nature if it should provide an immunity to any one against the ordinary dangers of his business, and it would be treating him as incapable of taking care of himself.

"If we declare that workmen are warranted against such carelessness, then the law places all careless men, which means all badly

educated or badly treated men, and it places even those who have not acquired a reputation for care, under the ban of at least a partial exclusion from all work. And this is the ordinary result of all undue attempts to protect by law one class of citizens against another. It is done at a practical sacrifice of liberty on the part of those intended to be protected, and to the embarrassment of the common business of life, by imposing upon the people a rule of a new and unusual character which may require half a century to become fitted like a custom, and adapted to the customs already existing which it does not have the effect of annulling."

10. Although adopted by every state in the Union, the rule has not been adopted in Scotland, and the opinion of the Scottish court is forceful and well worth giving. Lord Cockburn admits that in England, where "a person is injured by the culpable negligence of a servant, that the servant's master is liable in reparation, provided the injured person was merely one of the public, but that he is not so responsible if the injured person happened to be a fellow-workman of the delinquent servant. It is said, as an illustration of this, that if a coachman kills a stranger by improper driving, the employer of the coachman is liable; but that he is not liable if the coachman only kills the footman." His lordship added that the rule seemed to be recommended 'on account of its own inherent justice.' He then proceeded to attack the rule in the following fashion: "This last recommendation fails with me, because I think the justice of the thing is exactly in the opposite direction. I have rarely come upon any principle that seems less reconcilable to legal reason. I can conceive some reasonings for exempting the employer from liability altogether, but not one for exempting him only where those who act for him injure one of themselves. It rather seems to me that these are the very persons who have the strongest claim upon him for reparation, because they incur danger on his account, and certainly are not understood, by our law, to come under any engagement to take these risks upon themselves." (8)

CHAPTER II.

THE NATURE OF THE CONTRACT.

1. An employer, therefore, is not an insurer against all accidents that happen to his employees: When one enters into the service of another he takes on himself, in consideration of the compensation he is to receive, the ordinary risks of his employment, including

(8) *Dixon v. Ranken*, 1 Am. Railroad Cases 569.

the negligence of those employed around him. (9) In one of the cases, the court remarked that the rule rested upon the "sound principle that each one who enters upon the service of another, takes on himself all the ordinary risks of the employment in which he engages, and that the negligent acts of his fellow-workmen, in the general course of his employment, are within the ordinary risks." (10) On another occasion the same court remarked: "If the risk is an ordinary one, the employer is not liable, even if the employe did use ordinary care. In all such cases the risk of injury is one of the hazards which the employe assumes when he engages in the service to which it is incident. This has always been the law." (11)

2. Nevertheless, Justice Earl, of the New York Court of Appeals, has declared that this assumption is a fiction. We will quote his words: "To enforce the supposed public policy, a fiction has been invented by which the servant is said to assume all the risk of the service in which he engages, which include the risks of injuries caused by the negligence of co-servants engaged in the same common employment." (12) Whether this be a fiction or not there is no other assumption more deeply embedded in modern jurisprudence.

3. The courts have often said that the employe receives higher wages than would have been paid had his employer insured him against accidents. Thus, in *Strange v. McCormick* (13), Judge Laurie has remarked that "the law very properly presumes that every man who undertakes a business understands its character and the tools and machinery with which it is to be done, and on this account it is a fair presumption that he undertakes the risk for what he considers a sufficient compensation." This also is a pure judicial theory.

No evidence can be shown either to prove or disprove the assertion. It may be true or it may not be. It is a plausible theory, but nothing more. Perhaps if the employer had been held liable in all cases, he would not have offered as high remuneration; perhaps, instead of lowering it, he would have been more careful in selecting his employes in order to escape responsibility and loss. One cannot help thinking that the rule promotes negligence, or, rather, is the worst possible for the exercise of care by the employer.

(9) *King v. Boston & Worcester R.*, 9 Cush. 112; *Railroad Co. v. Fort*, 17 Wall. 553; *Burke v. Anderson*, 69 Fed. 814; *Schaub v. Hanibal & St. Joseph R.*, 106 Mo. 74; *Fifield v. Northern R.*, 42 N. H. 225; *Nash v. Nashua Iron Co.*, 62 N. H. 406; *Volz v. Chesapeake & Ohio R.*, 95 Ky. 188; *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71; *St. Louis R. v. Triplett*, 54 Ark. 289; *Buckalew v. Tenn. Coal & Iron Co.*, 112 Ala. 146.

(10) *Lewis v. Seifert*, 116 Pa. 646.

(11) *Northern Central R. v. Husson*, 101 Pa. 1, 7.

(12) *Crispin v. Babbitt*, 81 N. Y. 529.

(13) 10 Am. Law Jour. 358.

Had he been held to a more stringent rule, doubtless he would have been more careful in his selection of workmen and appliances. As long as the consequences of his neglect can be visited on his employe, the motive is weakened for exercising care.

4. It may be if employers had been held as insurers that they would have sought to exempt themselves from liability by special agreement. If they had, the question may be asked, would the agreement have been legal? It is well known that in some states common carriers can exempt themselves by special contract from the negligence of their agents and servants; in other states they cannot thus evade their liability. The exemption prevails in England, Canada, New York, New Jersey, Connecticut and West Virginia (14); but in Pennsylvania, Alabama, Indiana, Minnesota, Maine, Arkansas, Kansas, Virginia, Maryland, Tennessee and Ohio common carriers cannot relieve themselves from responsibility for their negligence by a contract, whatever be the form, and this, too, is the federal rule (15).

5. Let us begin by inquiring what the courts of Pennsylvania have said in the way of answer to this question. In the case of *Mitchell v. Pennsylvania R.* (16), Judge Taylor believed that the more lenient rule of liability which at that time was applied to carriers ought logically to be extended to all employers. Yet, on another occasion, Justice Lowrie remarked that, if employers were held liable to an employe for the negligence of a fellow employe "such a rule could have very little application to great corporations, for they would immediately act on the maxim *modus et consentio vincunt legem* and provide against it in their contracts."

If the courts of Pennsylvania had permitted carriers to relieve themselves from the consequences of their negligence to shippers, as they have been relieved by court or legislature in England, New York, New Jersey and some other states, then they might have logically extended the doctrine to negligence in other directions, but this is not the first occasion in which harmony of the law has been disregarded. It is difficult, however, to frame a good reason for

(14) *McCauley v. Furness Railway Co.*, L. R. 8 Q. B. 57; *Hall v. Northeastern R.*, L. R. 10 Q. B. 437; *Duff v. Great Northern R.*, L. R. 4 Irish 178; *Alexander v. Railroad*, 3 Strob. 594; *Wells v. Railroad Co.*, 24 N. Y., 181; *Magnin v. Dinsmore*, 56 N. Y. 168; *Kinney v. Railroad Co.*, 32 N. J. Law 407; *Griswold v. Railroad Co.*, 53 Conn. 371; *Skeels v. Baltimore & Ohio R.*, 3 W. Va. 566.

(15) *Pennsylvania R. v. Butler*, 57 Pa. 335; *Mobile & Ohio R. v. Hopkins*, 41 Ala. 486; *Hissong v. Railroad Co.*, 91 Ala. 514; *Ohio & Miss. R. v. Selby*, 47 Ind. 471; *Jacobus v. Railroad Co.*, 20 Minn. 125; *Willis v. Railroad Co.*, 62 Me. 488; *Kansas Pacific R. v. Peavey*, 29 Kan. 169; *Perry v. Railway Co.*, 44 Ark. 383; *Johnson v. Railroad Co.*, 86 Va. 975; *State v. Western Md. R.*, 63 Md., 433; *Memphis & Charleston R. v. Jones*, 2 Head 517; *Lake Shore R. v. Spangler*, 44 Ohio St. 471; *Railroad Co. v. Lockwood*, 17 Wall 357.

(16) 1 Am. Law Reg. 717.

permitting a contract of exemption from the consequences of negligence to be made with one class of employes and not with others or the public.

6. The Supreme Court of Arkansas has given a reason for the distinction (17). In that state by the common law, a common carrier can exempt himself by contract from all liability for his negligence to an employe, but not to other persons. A brakeman, therefore, who made a contract with a railroad company, taking on himself all the risk incident to his position and relieving it from all liability for its negligence arising from collisions, from defective machinery and the carelessness or misconduct of the company's employes, could not recover for an injury caused by the company's negligence in employing another incompetent servant. And this is the reasoning of the court: "A common carrier, or a telegraph company, cannot, by pre-contract with its customers, relieve itself from liability for its own negligent acts. This, however, may be on grounds of its public employment. The validity of the contract before us is not affected by such considerations. The relation existing between the parties to it is essentially a private relation—that, namely, of master and servant. The negligence of a fellow-servant is not in fact and in morals the negligence of the master, although by virtue of a statute it may be imputed to the master. It is impossible for the master always to be present and control the action of his servants; hence, a stipulation not to be answerable for their negligence beyond the selection of competent servants in the first instance, and the discharge of such as prove to be reckless or incompetent might be upheld as reasonable and binding."

There are two distinctions set forth in this opinion, and both are important. One distinction is that an employer may relieve himself from responsibility to an employe for the negligence of a co-employe, but not for imperfect or dangerous appliances, materials or machinery supplied by him to his employes. The reason for this distinction clearly is, if an employe proves to be negligent, though there was nothing to predicate this of him in the beginning, he is not morally liable for such negligence, and therefore may be permitted by the law to relieve himself of all responsibility therefor, but such a permission will not be extended to relieve him from the consequences of selecting imperfect appliances, etc., or even employes, if he knows when employing them, of their incompetency.

The other distinction is open to far more criticism. An employer, so the court contends, may relieve himself from the consequences of his negligence to one of his employes to the extent above mentioned, but cannot relieve himself with the public. Is the public safety of any greater worth than that of an individual? The carrier

(17) *Little Rock & Fort Smith R. v. Eubanks*, 48 Ark. 460.

may not be morally responsible to shipper or passenger for the negligence of an employe, but is held legally responsible therefor; why should not the same degree of responsibility be fastened on him with respect to one of his employes? Are they less worthy of judicial consideration than the public sparrows?

Furthermore, what is the public? Anything more than a number of individuals? And is the number to whom the rule is likely to be applied by a railroad company any more numerous than their own employes? Elsewhere this decision will be further considered.

7. In several states the question of relieving an employer by express contract has received judicial determination, and one of these is Alabama. In *Louisville & Nashville R. v. Orr* (18), the court declared that railroads like other corporations and persons had the right to adopt reasonable rules and regulations for the government of their employes, and for their own protection; but they cannot stipulate for immunity from liability for their own wrongful negligence. A rule which imposes upon an employe to look after and be responsible for his own safety contravenes the law itself, which fixes the liability of railroads for any negligence causing injury or death to their employes.

8. In Kansas, this question has risen under a statute (19). Prior to 1874 the common law rule prevailed in that state, that a master was not liable to his servant for an injury happening in consequence of the negligence of a fellow-servant engaged in the same general employment. In that year, however, the legislature changed the common law rule and made a railroad corporation liable for the negligence of an employe who injured another. After enacting the statute the railroad companies sought to set it aside with their employes by contracts releasing their companies from all liability. The question soon afterwards was raised whether such waivers were effective. The court declared that it was a familiar principle of law that a contract made in violation of a statute was void, and also that agreements contrary to the policy of statutes fell under the same ban. While the reason for the rule of the common law, that the master ought not to be responsible for injuries inflicted upon one servant by the negligence of another servant in the same common employment, seemed plausible and correct theoretically, yet it might be assumed that the legislature did not find in the partial operation of the rule sufficient security to persons engaged in the hazardous business of operating railroads. For the protection of the lives and limbs of the employes of such companies, therefore, the legislature deemed it necessary to enact the statute making railroad companies liable for all damages done to any of their em-

(18) 91 Ala. 548.

(19) *Kansas Pacific R. v. Peavey*, 29 Kan. 169, 175.

ployes in consequences of the negligence of a co-employee. "Now, if the statute was enacted for the better protection of the life and limb of railroad employes, it would be against public policy for the courts to sanction contracts made in advance for the release of this liability, especially when we consider the unequal situation of the laborer and his employer." Then the court used as an illustration the owners of coal mines, worked by means of shafts, who are required to make and construct escapement shafts in each mine for distinct means of ingress and egress for their employes. "Such a statute is for the benefit of employes engaged in working in coal mines; but the owner of such a mine would not be permitted to contract in advance with employes for operation of the mine in contravention of the provisions of the statute. The state has such an interest in the lives and limbs of its citizens that it has the power to enact statutes for their protection, and the provisions of such statutes are not to be evaded or revoked by contracts in contravention therewith. The general principle deduced from the authorities is, that an individual shall not be assisted by the law in enforcing a contract founded upon a breach or violation on his part of its principles or enactment; and this principle is applicable to legislative enactments, and is uniformly true in regard to all statutes made to carry out measures of general policy; and the rule holds equally good, if there be no express provision in the statute peremptorily declaring all contracts in violation of its provisions void in regard to statutes intended generally to protect the public interests, or to vindicate the public morals."

9. In Ohio, the question has arisen independently of any statute. In the case of the *Railway Company v. Spangler* (20), the court inquired whether it was competent for a railway company to stipulate with its brakemen, at the time, and as a part of their contract of employment, that the company shall not be liable for the negligent acts of its conductors. After declaring that the rule of law governing the liability of railway employers to their employes was, that a railroad company was liable to an employe for an injury received through the negligence of another employe under whose control he was placed (21), the court added: "The policy of our law being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private compact with their employes, stipulating that they shall not be held to a liability for the negligence of their servants, which public policy demands shall attach to them. The answer is obvious. Such liability is not created for the protection of the employe simply, but has its reason and foundation in a public necessity and policy

(20) 44 Ohio St. 471.

(21) *Little Miami R. v. Stevens*, 20 Ohio 415.

which should not be asked to yield or surrender to mere private interests and agreements."

10. In Alabama, another case has arisen upon a contract stipulating that the compensation paid "shall cover all risks incurred, and liability to accidents from any cause whatever, and if an employe is disabled by accidents or other cause, the right to claim compensation for injuries will not be recognized" (22). This was declared to contravene a statute providing that the employer was liable to answer in damages to the employe when the injury was caused by reason of the negligence of any person in the service or employment of the master or employer who had charge of any engine, car or train upon a railway. The stipulation was held to be opposed to public policy, and did not avail to secure non-liability for an injury caused to an employe by the railway's negligence or misconduct in the cases specified in the statute.

11. In Arkansas, too, in the case already described, it was held that a railroad company cannot release itself in advance from responsibility beyond the line or degree mentioned, namely, the consequences of a servant who was regarded as competent at the time of employing him. A stipulation, therefore, releasing the company from all liability with respect to its track, cars, machinery, materials, tools and appliances is void, and clearly against public policy. The reasoning of the court is worth adding: "The state has an interest in the lives and limbs of all its citizens. Laborers for hire constitute a numerous and meritorious class in every community, and it is for the welfare of society that their employers shall not be permitted, under the guise of enforcing contract rights, to abdicate their duties to them. The consequence would be that every railroad company and every owner of a factory, mill or mine, would make it a condition, precedent to the employment of labor, that the laborer should release all right of action for injuries sustained in the course of the service, whether by the employer's negligence or otherwise. The natural tendency of this would be to relax the employers carefulness in those matters of which he has the ordering and control, such as the supplying of machinery and materials, and thus increase the perils of occupations which are hazardous, even when well managed. And the final outcome would be to fill the country with disabled men and paupers, whose support would become a charge upon the counties or upon public charity." (23)

12. The same view has been taken by a federal court. In *Roesner v. Herman* (24), an employer, who was a manufacturer, made a con-

(22) *Hissong v. Richmond & Danville R.*, 91 Ala., 514; *Richmond & Danville R. v. Jones*, 92 Ala. 218.

(23) *Little Rock & Fort Smith R. v. Eubanks*, 48 Ark. 468.

(24) 10 Biss. 486.

tract with one of his employes whereby he was released from all liability to any employe for injury or death happening through another employe's negligence. Judge Gresham, declared that "when the employer's negligence in supplying his employe with unsafe machinery has caused the death of the latter, the law will not allow the employer to say as in effect he does in this answer. 'It is true that my machinery was defective and unsafe, and my negligence caused the death of my employe, but I am not liable to those who have suffered from the loss of his life, because I had a contract with him which secured to me the right to supply him with unsafe and defective machinery, and to be negligent.' Such a contract is void as against public policy."

13. In Tennessee, a case arose in 1857 about the hiring of two slaves. A railroad company made a contract with the owner, which contained the following stipulation: "And all risks incurred, or liability to accidents, whilst in said service, is compensated for and covered by the pay agreed upon; the said railroad company assuming no responsibility for damages from accident, or any cause whatever." (25) The court remarked that the language of the instrument was very strong, but must receive a reasonable and sensible construction. "It would be most absurd to suppose that it was the intention and understanding of the parties that the company should be protected from liability, not only against all the casualties to which the slave might be exposed in working on the road, but also against injuries caused by third persons in which the company had no participation, but likewise against injury or loss occasioned by the wilful wrong, or gross negligence of the company itself, or its agents. Such a construction of the agreement is altogether inadmissible. The stipulation is not available for the defendant against its own wilful wrong, or culpable negligence."

14. The same view is maintained by the Supreme Court of Virginia (26). In a case in which such an agreement had been made, and the counsel for the employing railroad company contended that it was legal, the court remarked that "it would be strange indeed if such a doctrine could be maintained. To uphold the stipulation in question would be to hold that it was competent for one party to put the other party to the contract at the mercy of its own misconduct, which can never be done lawfully where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void. Nothing is better settled, certainly in this court, than that a common carrier cannot by contract exempt himself from responsibility for his own or his servant's negligence in the carriage of goods or passengers for

(25) *Memphis & Charleston R. v. Jones*, 2 Head 517.

(26) *Johnson v. Richmond & Danville R.*, 86 Va. 875, 878.

hire. This is so independently of the code; and the principle which vitiates a stipulation for exemption from liability for one's own negligence is not confined to the contracts of carriers as such; it applies universally."

15. The question has been considered in New York. In 1891, the case of *Purdy v. Rome & Watertown R.* (27) came before the New York Court of Appeals for final determination. Purdy had made a formal agreement releasing the railroad from all liability to him "by reasoning the negligence of the company, its agent, servants and employes;" and the consideration for doing so was his "employment and the compensation agreed to be paid therefor." The agreement was declared void for lack of consideration. "It constituted a simple guaranty on the part of the plaintiff to the defendant, relieving it from a liability or responsibility which there existed in favor of plaintiff, and in obtaining which the defendant surrendered and promised nothing. The plaintiff was in precisely the same position he was prior to its execution, excepting he had given up to the defendant all claim upon it which he otherwise might have by law, and he had received not one particle of consideration for such surrender of his legal rights." (28) The court further remarked that it did not mean to intimate that if the defendant had given some kind of a consideration for the paper it would have been valid. "It might even then be urged that public policy forbids the execution of such a contract from its employes by railroad and other corporations."

16. A case has arisen in Texas worthy of notice. A railroad company made a contract with one of its employes not to attempt to couple or uncouple a car unless he knew that the coupling was in a proper condition. "This," said the court, "imposes upon the servant a duty which the law imposes upon the master—to see that the implements furnished his servant are in a reasonably safe state of repair. This, it is believed, it not permissible." (29)

17. The only state, perhaps, sustaining the opposite principle, that an employer can relieve himself from liability for his own negligence to his employes, besides Pennsylvania, is Georgia. In the case of the *Western & Atlantic R. v. Bishop* (30), an employe agreed to take upon himself all risks connected with or incident to his position on the road, and that he would in no case hold the company liable for any damage he might sustain by accident or carelessness or misconduct of himself or other employe, or person connected with such road, or in the service of the company. It was decided that this contract, so far as it did not waive any criminal neglect of

(27) 125 N. Y. 209.

(28) *Potter v. Detroit R.*, 81 N. W. Rep. 80, s. c. 82 N. W. Rep. 245.

(29) *Missouri, Kansas & Texas R. v. Wood*, 35 S. W. Rep. 879.

(30) 50 Ga. 465.

the company, or of its principal officers, was a legal contract and binding upon the employe. The court, speaking through Justice McCay, remarked: "We do not say that employer and employe may make any contract, we simply insist that they stand on the same footing as other people. No man may make a contract contrary to law, or contrary to public policy or good morals, and this is just as true of merchants, lawyers and doctors, of buyers and sellers, and bailors and bailees, as of employers and employes. Will it for a moment be insisted that one who borrows a horse may not stipulate he shall only exercise the care cast by law upon one who hires a horse? May not a warehouseman stipulate that he will take extraordinary care when the law, in the observance of such a stipulation, would cast upon him only ordinary care? May he not even stipulate that all the risk shall be upon the bailor? *Modus et consensio vincunt legem* is the most elementary principle of law in regard to contracts. The form of agreement and the convention of parties overrule the law." (31)

The court founded their conclusion partly on a provision of the Georgia code which declares that "a person may waive or renounce what the law has established in his favor, when he does not thereby injure others, or affect the public interest." "So far as I know," remarks the court, "this ancient rule is applicable to all the private relations in which men may place themselves towards each other."

18. The Georgia view is strongly supported by English law. In 1880 the Employer's Liability Act was passed by Parliament, whereby a workman or his legal representatives "have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work." Shortly afterward, an employer sought to relieve himself from the liability imposed on him by this act by contract, and a county court held that this could not be done, that such a contract was against public policy. But the court of review decided differently. Speaking through Justice Field, the court said: "It is at least doubtful whether where a contract is said to be void, as against public policy, some public policy which affects all society is not meant. Here the interest of the employed only would be affected. It is said that the intention of the legislature to protect workmen against imprudent bargains will be frustrated if contracts like that one are allowed to stand. I should say that workmen as a rule were perfectly competent to make reasonable bargains for themselves. At all events I think the present one is quite consistent with public policy." (32)

(31) For other Georgia cases, see *Western Atlantic R. v. Strong*, 52 Ga. 461; *Galloway v. Western & Atlantic R.*, 57 Ga. 512; *Cook v. Railway Co.*, 72 Ga. 48; *Fulton Bag & Cotton Co. v. Wilson*, 89 Ga. 318.

(32) *Griffith v. Earl of Dudley*, 102 Q. B. Div. 357, 363.

The reasoning of the English court seems very strong, and if the question be regarded as solely between employed and employer, it is difficult to resist the conclusion that the parties thereto ought to be permitted to exercise their freedom and make such a contract as they desire. But is this the entire question? Is there not another and larger side, whether any one should be permitted for public reasons from relieving himself by contract from the consequences of his negligence? Is not the public seriously affected by the exercise of such power? Would not the care, skill and morals of employer and employed degenerate were employers permitted to relieve themselves by contract of every thought of care in furnishing and using all kinds of material, machinery and appliances? Would not the direct and unquestioned tendency be the growth of neglect with the inevitable accompaniment of more accidents and a larger loss of life? That such a result would be very serious to society no one will question. In the case of *Crew v. The Bradstreet Co.* (33), Chief Justice Paxson remarked "that contracts against liability for negligence are not favored by the law. In some instances, such as common carriers, they are prohibited as against public policy. In all cases, such contracts should be construed strictly, with every intendment against the party seeking their protection." This is sound reasoning and should be decisive of the question.

19. An employe assumes by contract the risk attending his employment. The law declares he knows what he is doing. It is true he does not say a word concerning the risk, but the law says so for him. "The immunity of the master," remarks the Supreme Court of New Jersey, "rests upon the contract of hiring, and not upon the observance or presence of negligence in either party. The master says to the servant, 'You understand fully the nature of the employment and the danger attending it; will you enter it?' The servant says, 'I accept it,' and the law implies that he accepts it, with all the risk incident to it, without regard to the magnitude of the dangers." (34)

20. An employe must use ordinary care to avoid injuries to himself. He is under as great obligations to provide for his own safety from such dangers as are known to him, or discoverable by the exercise of ordinary care on his part, as his employer is to provide for his safety. (35) "This principle," says Justice Murphy, "should never be disregarded, and this is especially so in employments where the machinery is not complicated, or the tools and

(33) 134 Pa. 161, 169.

(34) *Foley v. Jersey City Electric Light Co.*, 54 N. J. Law 414.

(35) *Wormell v. Railroad*, 79 Me. 405.

implements used are continually in the hands of the employe, and no great care or skill is required to discover defects." (36)

21. In a case arising from an injury to a person working in a saw mill this principle was applied. It was declared that he was under no obligation when beginning his employment to go through the mill and make himself familiar with each piece of machinery and thus learn the danger he might incur by coming in contact with it. "It was sufficient for him when undertaking his duties to ascertain what he was expected to do, and the dangers directly connected therewith, and he had a right to assume that, in the performance of his particular duty, reasonable facilities therefor would be afforded him, without coming in contact with other unforeseen or unsuspected dangers." (37). Such is the general rule often repeated with slight variations as the particular case seemed to require. It is quite impossible to state this duty or requirement of employes in precise words, because their situation is so varying. That he must exercise ordinary care in executing his employment is a universal rule. The hazard of working in a mine is greater than that of working on a farm, or in a cotton factory. An employe therefore assumes the hazards of the ordinary perils attending his employment whatever they may be. Says Justice Sherwood: "Whatever hazards are concomitants of the employment, the employe assumes necessarily when engaging in the performance of the duties pertaining thereto." (38)

(36) *Latnode v. Harter*, 20 Nev. 303, 312; *Hughes v. Winona R.*, 27 Minn. 137; *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Darracott v. Chesapeake & Ohio R.*, 83 Va. 288, 294; *Clark v. Richmond & Danville R.*, 78 Va. 709; *Sheeler v. Chesapeake & Ohio R.*, 81 Va. 188; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Muldowney v. Illinois Central R.*, 39 Iowa 615; *Toledo R. v. Ashbury*, 84 Ill. 429; *Hathaway v. Michigan Central R.*, 51 Mich. 253; *Lockwood v. Chicago R.* 55. Wis. 50; *Memphis & Charleston R. v. Thomas*, 51 Miss. 637; *Railroad v. Jones*, 95 U. S. 439; *Juttle v. Milwaukee R.*, 122 U. S. 189; *Illick v. Railroad Co.*, 67 Mich. 637.

(37) *Swoboda v. Ward*, 40 Mich. 420, 423.

(38) Cases in which the courts have held that the employe must exercise ordinary care when doing his work, examine his appliances, etc.:

Mich.: *Ragon v. Toledo R.*, 97 Mich. 265; *Batterson v. Chicago & Grand Trunk R.*, 53 Mich. 125; *Karrer v. Detroit R.*, 76 Mich. 400; *Bresser v. Flint R.*, 56 Mich. 620.

Maine: *Langlois v. Railroad*, 84 Me. 161.

Wis.: *Writt v. Girard Lumber Co.*, 91 Wis. 496.

Mo.: *Alcorn v. Chicago & Alton R.*, 108 Mo. 81; *Porter v. Hannibal & St. Joseph R.*, 71 Mo. 66; *Devlin v. Wabash R.*, 87 Mo. 545; *Thomas v. Mo. Pacific R.*, 109 Mo. 197.

Va.: *Darracott v. Railway Co.*, 83 Va. 288; *Norfolk & Western R. v. Emmert*, 83 Va. 640.

Ind.: *Diamond Plate Glass Co. v. DeKorty*, 143 Ind. 381; *Rogers v. Leyden*, 127 Ind. 50; *Louisville R. v. Buck*, 116 Ind. 566; *Ohio & Miss. R. v. Percy*, 128 Ind. 197; *Lake Erie R. v. Utz*, 133 Ind. 265; *Day v. Cleveland R.*, 137 Ind. 206.

If an employe is engaged in a dangerous service, he is required to use very great precaution to avoid danger, and if he does not, and is injured, he has no right to recovery against his employer. (39) But the dangers, as everyone knows, vary from almost absolute immunity to the gravest. They are manifold in kind and degree. When, therefore, we have said that the care that must be used is measured by the danger, we can say no more. In a given case, the question arises. Did the injured person exercise all the care the law required? This is a fact to be answered by the jury, after receiving proper instruction by the court. (40)

To the foregoing we may add the words of a well-known legal writer, which have been adopted by a legal tribunal: "It is the duty of the employe to go about his work with his eyes open. He may not wait to be told but must act affirmatively. He must take ordinary care to learn the dangers which are likely to beset him

Pa.: Scholl v. Cole, 107 Pa. 1; Philadelphia & Reading R. v. Huber, 128 Pa. 63.

Wash.: Jennings v. Tacoma R., 7 Wash. 275; Olsen v. McMurray Cedar Lumber Co., 9 Wash. 500.

Iowa: Muldowney v. Illinois Cent. R., 36 Iowa 462, s. c. 39 Iowa 615; Way v. Illinois Central R., 40 Iowa 341; Lumley v. Caswell, 47 Iowa 159.

S. Car.: Evans v. Chamberlain, 40 S. C. 104.

Ky.: Louisville & Nashville R. v. Foley, 94 Ky. 220.

Ill.: Chicago & Alton R. v. Johnson, 116 Ill. 206; McCormick Harvesting Machine Co. v. Burandt, 136 Ill. 170, 177.

Texas: Houston & Texas Cent. R. Co. v. McNamara, 59 Tex. 255; Taylor R. v. Taylor, 79 Texas 104.

Ala.: Georgia Pacific R. v. Davis, 92 Ala. 300.

Del.: Giles v. Diamond State Iron Co., 8 At. 368.

Ohio: Mad River R. v. Barber, 5 Ohio St. 541.

Ga.: Stubbs v. Atlanta Cotton-Seed Oil Mills, 92 Ga. 495; Austin v. Appling, 88 Ga. 54; Georgia Railroad & Bkg. Co. v. Kenney, 58 Ga. 485.

N. Y.: Shields v. New York Central R., 133 N. Y. 557; Crown v. Qrr, 140 N. Y. 450, 453.

Ark.: Fordyce v. Edwards, 60 Ark. 438; Little Rock, R. v. Leverett, 48 Ark. 333.

Tenn.: Cumberland Co. v. Loomis, 3 Pickle 504.

Fed.: Little Rock R. v. Moseley, 56 Fed. 1009.

(39) Lake Shore R. v. Roy, 5 Ill. App. 82.

(40) Hathaway v. Railroad Co., 51 Mich. 259; Batterson v. Railway Co., 53 Mich. 127; Illick v. Railroad Co., 67 Mich. 639; Morton v. Railroad Co., 81 Mich. 435; Lake Shore R. v. O'Connor, 115 Ill. 254; Chicago R. v. Avery, 8 Ill. App. 133; Walsh v. Railroad Co., 27 Minn. 367; Anderson v. Railroad Co., 39 Minn., 523; Stroble v. Chicago R., 70 Iowa 555; Stephenson v. Duncan, 73 Wis. 405; Wedgewood v. Railway Co., 41 Wis. 478; Smith v. Peninsular Car Works, 60 Mich. 506; Fort Wayne R. v. Gildersleeve, 33 Mich. 133; Melzer v. Peninsular Car Co., 76 Mich. 94; Fisher v. Railway Co., 77 Mich. 546; Clark v. Railroad, 28 Minn. 128; Platt v. Railroad, 84 Iowa 694; Gibson v. Railroad, 63 N. Y. 449; Rains v. Railroad, 71 Mo. 164; Davis v. Railroad, 21 S. Car. 93; Missouri Pacific R. v. Somers, 71 Texas 700; Brossman v. Lehigh Valley R., 113 Pa. 490; Lovejoy v. Railroad, 125 Mass. 79.

in the service. If the master provide written or printed instructions or warning, it is his duty to read them. He must not go blindly and hurriedly to his work where there is danger. He must inform himself. This is the law everywhere. The servant is held by his contract of hiring, to assume the risk of injury from the ordinary dangers of the employment; that is to say, from such dangers as are known to him, or discoverable by the exercise of ordinary care on his part. He has, therefore, no right of action, in general, against his master for an injury befalling him from such a cause. His right to recover will often depend upon his knowledge or ignorance of the danger. If he knew of it or was under a legal obligation to know of it, it was part of his contract, and he cannot in general recover." (41)

22. In determining whether an employe has failed to exercise due care in avoiding danger, it is always necessary to take into consideration the exigencies and circumstances under which he acted. "If the service which he undertook to perform was required by a superior, and was such as to demand his exclusive attention, and that he should act with rapidity and promptness, it would be unreasonable to require of him that care, thought and scrutiny which might be exacted when there is time for observation and deliberation. In emergencies, where such attention, rapidity and promptness are demanded, it could hardly be expected that he would always call to mind previous information or knowledge that, if at the moment remembered, would have caused him to avoid the danger from which his injuries resulted. Under such circumstances the question of his due care would depend to some extent upon the view the jury might take of the necessity for immediate action and the time he had for reflection or thought." (42)

23. This principle has been carried very far. Thus, when persons at work on a railroad have been injured from the lack of a flagman to give notice of the coming of trains, the courts have often declared that, unless the statute required the company to have one, they would not hold this to be one of its duties. An accident might be prevented if a flagman were employed, but if men engage in labor, knowing there is no flagman, they assume the risk. (43)

If an accident occurs and no flagman is present, the injury assumes this form,—what care should be exercised in view of having no flagman in running trains. Evidently a different course is required than would be had a flagman been employed. The jury,

(41) Beach on Contributory Negligence, quoted by Sherwood, Ch. J., in *Thomas v. Missouri Pacific R.*, 109 Mo. 199.

(42) *Battle, J., St. Louis R. v. Higgins*, 53 Ark. 458, 466.

(43) *McGrath v. Railroad*, 63 N. H. 522; *Houghkirk v. Canal Co.*, 92 N. Y. 227; *Philadelphia & Reading R. v. Killips*, 88 Pa., 405, 412; *Heddles v. Railroad*, 74 Wis. 256.

therefore, is not permitted to declare that a railroad company is negligent when the fact of the flagman's absence is proved, because the risk from the danger is assumed. The jury is confined to the sole inquiry, How did the company run its train? Did it do this in a negligent manner in view of the fact that no flagman was employed at the place of the injury? If the company did, then it is liable; if the company did not, then it is not liable whatever may have been the consequence to the employees.

24. Another application of the principle may be made to an injury happening from exposed machinery. If employers were required to box it, injuries might be prevented; but juries are not permitted to find that to employ it in an exposed manner is negligence if the employe knew, or ought to have known of the danger.

Thus, in *Coombs v. New Bedford Cordage Co.*, Justice Hoar remarks that it cannot be doubted "that it is the legal right of every person to carry on a business which is dangerous, either in itself or in his manner of conducting it, if it is not unlawful, and interferes with no right of other persons." (44) In such a case if a person is injured, the jury cannot find that his employer is negligent in not protecting employes from danger by guarding it, though the evidence may show clearly enough that it would not have happened had it been guarded, for the reason that the danger, however great, if known, or might have been by ordinary observation, is assumed by an employe.

25. The law imposes another requirement on an employe. He must observe and inspect the condition of the appliances used by him not solely for his own protection, but to promote the interest of his employer. In a well reasoned case, the court remarked that a workman who had charge of, or used implements or appliances in the performance of his work, preserve them in a condition which would render them fit for the purposes to which they were devoted. If they are exposed to wear or destruction from use, he must have repairs made; or, if he can properly restore them for use, he must do this himself. If such repairs can not be done by him, he must report the fact to his employer or other person having charge of such work. (45)

26. When machinery is defective or dangerous, the law assumes that an employe will exercise the same care to find out its real condition as in other cases. But there is a difference in the duty of the master and servant in this regard which has been thus stated by Justice Thomas, of the Supreme Court of Missouri: "The master is bound to look for defects, while the servant is bound only to discover what the ordinary use of the appliances would make

(44) 102 Mass. 572, 585.

(45) *Stroble v. Chicago R.*, 70 Iowa 555, 558.

known to a man of ordinary prudence. The master is held to know the defect if by the exercise of ordinary care he might know it. The servant has a right to assume that the master has furnished him with safe machinery unless its condition is such that by the exercise of ordinary care he would have discovered its defects." (46)

In the case of a brakeman who sued his employer for an injury caused by a defective brake, the court remarked that the employe was charged with the duty of exercising his faculties, and with the knowledge of such defects as were observable with the reasonable exercise of them in connection with the performance of his accustomed duties. But he was not bound to search for defects, or to test the machine in advance of using it, for he had the right to use the same, relying on the master for the discharge of his duty in providing a safe appliance without stopping to investigate its sufficiency or soundness, unless the defect was so apparent as to convey to him its unsafe and dangerous condition on his approach without investigation. If the employe had actual knowledge of its unsafe condition, then it would be negligence to use it, and if he did so he would assume the extra hazard in so doing. (47)

(46) *Gutridge v. Missouri Pacific R.*, 105 Mo. 520, 526.

(47) *Maine: Wormell v. Railway Co.*, 79 Me. 404.

Massachusetts: Ford v. Fitchburg R., 110 Mass. 240; *Holden v. Fitchburg R.*, 129 Mass., 268; *Ferren v. Railroad*, 143 Mass. 197; *Lawless v. Railroad*, 136 Mass. 1.

Vermont: Davis v. Railroad, 55 Vt. 84.

New York: Kain v. Smith, 89 N. Y. 376; *Fuller v. Jewett*, 80 N. Y. 46; *Flike v. Railroad*, 53 N. Y. 549; *King v. Railroad*, 72 N. Y. 607; *Cone v. Railroad*, 81 N. Y. 207; *Marsh v. Chickering*, 101 N. Y. 400; *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 278; *Ellis v. Railroad*, 95 N. Y. 546.

Missouri: Pater v. Railroad, 60 Mo. 160; *Long v. Railroad*, 65 Mo. 225; *Bridges v. Railroad*, 6 Mo. App. 389.

Pennsylvania: Baker v. Railroad, 95 Pa. 211; *Pittsburg & Chicago R. v. Sentmeyer*, 92 Pa. 276; *Lehigh & Wilkes-Barre Coal Co. v. Hayes*, 128 Pa. 294.

Kansas: Kansas Pacific R. v. Little, 19 Kan. 267.

Georgia: Baker v. Railroad, 68 Ga. 699.

Ohio: Lake Shore R. v. Fitzpatrick, 31 Ohio St. 479; *Mad River R. v. Barber*, 5 Ohio St. 541.

Tennessee: Guthrie v. Railroad, 11 Lea 372.

Minnesota: Drymala v. Thompson, 26 Minn. 40.

Wisconsin: Stephenson v. Duncan, 73 Wis. 406; *Naylor v. Railway Co.*, 53 Wis. 661; *Brabbitts v. Railway Co.*, 38 Wis. 289; *Smith v. Railway Co.*, 42 Wis. 520; *Dorsey v. Construction Co.*, 42 Wis. 583; *Wedgewood v. Railway Co.*, 44 Wis. 44; *Stetler v. Railway*, 46 Wis. 497; *Bessex v. Railway Co.*, 43 Wis. 477; *Hulekan v. Railway Co.*, 58 Wis. 318; *Heine v. Railroad*, 58 Wis. 531.

Indiana: Lake Shore R. v. McCormick, 74 Ind. 440; *Indiana Car Co. v. Packer*, 100 Ind. 181; *Cincinnati R. v. McMullen*, 117 Ind. 439; *Cincinnati R. v. Roeach*, 126 Ind. 445.

New Jersey: Paulmier v. Railroad, 34 N. J. Law 151.

Michigan: Smith v. Peninsular Car Works, 60 Mich. 501; *Lyttle v. Railroad*, 84 Mich. 289.

27. There is another requirement the reasonableness of which no one can question. When work can be done in several ways and an employe voluntarily chooses the most perilous because it may be more convenient, he alone must suffer the consequences. Many an employe has failed to recover because he chose to violate this salutary rule. (48)

28. Though an employe assumes the risk from the negligence of his co-employe, this means only that he assumes it quo ad hoc employer, but not as against his co-employe. If, therefore, one by his negligence injures another, the defense will not prevail, in a suit against him, that both are employed by the same master. (49)

Baird H. Newman CHAPTER III.

DUTIES OF EMPLOYERS.

Section 1.

The General Rule—Ordinary Care.

1. Though an employe is held to be his own insurer of all ordinary risks, a rule of duty has long been prescribed for employers of great importance. This rule is that an employer must exercise due or ordinary care (1) in selecting servants; (2) in furnishing them with suitable materials, and appliances for their tasks; (3) in keeping the appliances in repair; (4) in providing safe places for working; (5) in furnishing adequate assistance to do the work desired; (6) and lastly in giving proper regulations or instructions to youthful or inexperienced workmen. Had this rule always been enforced the legal relations between employers and employed would be much better understood than they are to-day. Its destruction by slow degrees through judicial action is perhaps the most remarkable overthrow of a great principle in modern judicial history. To do this the courts have taken about fifty years, and the solemnity

Illinois: Chicago & Northwestern R. v. Jackson, 55 Ill. 492; Toledo R. v. Ingraham, 77 Ill. 309; Chicago R. v. Avery, 109 Ill. 314; Richardson v. Cooper, 88 Ill. 270; Pennsylvania Co. v. Lynch, 90 Ill. 333.

Texas: Galveston R. v. Delahunty, 53 Texas 206.

Iowa: Greenleaf v. Railroad, 29 Iowa 14; Burns v. Railroad, 69 Iowa 452.

California: Trask v. California R., 63 Cal. 96.

Connecticut: Wilson v. Willimantic Linen Co., 50 Conn. 433.

United States: Wabash R. v. McDaniels, 107 U. S. 454.

(48) St. Louis Bolt & Iron Co. v. Brennan, 20 Ill. App. 455.

(49) Griffiths v. Wolfram, 22 Minn. 185; Steinhauser v. Spraul, 114 Mo. 5518; Hinds v. Overacker, 66 Md. 547; Osborne v. Morgan, 130 Mass. 102; Kenney v. Cane, 9 Tex. Civ. App. 150; Warax v. Cincinnati R., 72 Fed. 637.

and dignity with which they have labored at their task is as remarkable as their success. It is true that in many states legislatures have somewhat undone the work of courts, while the English Parliament has swept almost wholly away the elaborate system of rules established by the courts for narrowing the liabilities of employers.

2. We may begin by inquiring, what is meant by ordinary care? The term has thus been defined by the Supreme Court of Vermont: (50) "A man in any situation of business is always bound to conform to the rules and usages which prudent and careful men have established in the conduct of similar business under similar circumstances, and the rule by which he is to govern the use of his own, is, that which is established by the concurrent use of careful and prudent men in that particular business." In briefer language, the Supreme Court of Ohio has defined the term "as such care as is most common and usual in the business." (51) To these remarks may be added those of the Supreme Court of Massachusetts. "What is ordinary care cannot determined abstractly. It has a relation to, and must be measured by the work or thing done and the instrumentalities used, and their capacity for evil as well as good. What would be ordinary care in one case would be gross negligence in another. We look to the work; its difficulties, dangers and responsibilities, and then say, 'What would and should a reasonable and prudent man do in such an exigency.' The word 'ordinary' has a peculiar sense, which would greatly relax the rigor of the rule. The law means by ordinary care, the care reasonable and prudent men are under like circumstances." (52)

3. The courts have tried to define more precisely the meaning of the care and diligence that must be exercised by employers, but the inquiry is always disappointing; it always eludes a precise answer. The answer given by the United States Supreme Court may be added to those already given, because it is the answer of the highest judicial tribunal. The opinion was delivered in the case of railroad employe against its employer. "Ordinary care on the part of a railroad company implies, as between it and its employes, not simply that degree of diligence which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of the employes, is fairly commensurate with the perils and dangers likely to be encountered. Ordinary care implies the exercise of reason-

(50) *Vinton v. Schwab*, 32 Vt. 612.

(51) *Mad River R. v. Barber*, 5 Ohio St. 541.

(52) *Cayzer v. Taylor*, 10 Gray, 280.

able diligence, and reasonable diligence implies, as between the employer and employe, such watchfulness, caution and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise." (53

4. In manufacturing, transporting, or keeping an exceptionally dangerous thing, powder or dynamite, for example, more care must be exercised than in refining, transporting or keeping sugar. This subject has been well considered by Justice Field of the Supreme Court of the United States in the case of an employe in an iron mine who was injured by an explosion of dynamite. "All occupations producing articles or works of necessity, utility or convenience may undoubtedly be carried on, and competent persons familiar with the business and having sufficient skill therein may properly be employed upon them, but in such cases where the occupation is attended with danger to life, body or limb, it is incumbent upon the promoters thereof and the employers of others thereon to take all reasonable and needed precaution to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the person engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted." In the controversy before the court it was shown that the explosive nature of the materials from heat or collision was well known to the employers, and this was a continuing admonition to them to take every precaution to guard against such a consequence. "Occupations, however important," continued the court, "which cannot be conducted without necessary danger to life, body or limb should not be prosecuted at all without reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle, that, in all occupations which are attended with great and unusual danger, there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers therein. Liabilities for injuries following a disregard of such precautions will otherwise be incurred and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers or laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers

will also be chargeable for the injuries sustained. Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous occupations, and by the laborers themselves, as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced." (54)

If it is not easy to define clearly ordinary care, for the reason that the term eludes exact definition, a still greater difficulty arises in applying it. The cases to which it is applied may be divided into three classes: (1) those in which the courts have had no difficulty in deciding that employers exercised ordinary care, and (2) others in which their lack of such care was equally apparent. Between these is a third class, a middle ground, in which not the rule, but the facts have caused the difficulty. Many cases belong to this class, and in deciding them the courts have differed. We do not know that any fruitful purpose will be served in reviewing them, for doubtless courts will continue to differ in their conclusions concerning the facts, just as they have done ever since they have attempted to apply the rule. (55)

(54) *Mather v. Rillston*, 156 U. S. 391, 398.

(55) Other cases defining ordinary care:

Illinois: *Chicago R. v. Avery*, 109 Ill. 314; *Richardson v. Cooper*, 88 Ill. 270; *Pennsylvania Co. v. Lynch*, 90 Ill. 33; *Chicago & Alton R. v. Kerr*, 148 Ill. 605; *Lake Shore v. O'Connor*, 115 Ill. 254; *Kranz v. White*, 8 Ill. App. 583; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Indianapolis R. v. Fay*, 91 Ill. 474.

California: *Brymer v. Southern Pacific R.*, 90 Cal. 497.

Massachusetts: *Lawless v. Railroad*, 136 Mass. 1; *Warden v. Railroad*, 137 Mass. 204; *Holly v. Boston Gaslight Co.*, 8 Gray 131; *Shaw v. Railroad*, 8 Gray 79; *Cayzer v. Taylor*, 10 Gray 280.

New York: *Painter v. Railroad*, 83 N. Y. 61; *Devlin v. Smith*, 89 N. Y. 470; *Slater v. Jewett*, 85 N. Y. 61; *Marsh v. Chickering*, 101 N. Y. 396; *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273; *Brand v. Schnecktady R.*, 8 Barb. 368; *Ernst v. Hudson River R.*, 35 N. Y. 9; *Burke v. Witherbee*, 98 N. Y. 562.

Iowa: *Greenleaf v. Railroad*, 29 Iowa 14; *Cooper v. Railroad*, 44 Iowa 134; *Hunt v. Railroad*, 26 Iowa 363; *Willoughby v. Railroad*, 37 Iowa 432.

Maine: *Wormell v. Maine Central R.*, 79 Me. 397.

Minnesota: *Gates v. Southern Minn. R.*, 28 Minn. 110; *Hall v. Chicago R.*, 46 Minn. 439.

Maryland: *Baltimore & Ohio R. v. Worthington*, 21 Md. 368; *Wise v. Ackerman*, 76 Md. 375.

Vermont: *Davis v. Hulet*, 58 Vt. 90; *Morrissey v. Hughes*, 65 Vt. 553.

Rhode Island: *Smith v. Old Colony R.*, 10 R. I. 22.

Pennsylvania: *Titus v. Bradford R.*, 136 Pa. 618; *Rooney v. Carson*, 161 Pa. 26.

Michigan: *Michigan Central R. v. Coleman*, 28 Mich. 448.

Wisconsin: *Read v. Morse*, 34 Wis. 318; *Atkinson v. Goodrich Transp. Co.*, 69 Wis. 6; *Ward v. Railroad*, 29 Wis. 148.

Georgia: *Central Railroad & Bkg. Co. v. Ryles*, 84 Ga. 420.

Section 2.

Selection of Competent Employees.

1. Passing from the general to the particular, we will proceed to consider more fully each of the six clauses or divisions of the great rule defining the duties and liabilities of employers. The first division relates to the employment of competent employees.

2. The rule guiding employers has been thus stated by the Supreme Court of Pennsylvania: "What employers owe to their servants and workmen," says Justice Sharswood, "is the exercise of reasonable care and proper diligence in providing them with safe machinery and suitable tools, and in employing with them fit and competent superintendents and fellow-workmen. Not that they warrant the result, nor that extraordinary vigilance is exacted of them. It is nevertheless true that what is due care and ordinary diligence will much depend on the kind of business which is carried on, and the sort of material which is handled. The proprietor of a powder mill must exert more precaution than the master of a blacksmith shop. So, in such an establishment as that of refining oil from crude petroleum, a material highly inflammable and explosive, we are bound to examine the question of negligence with regard to this circumstance." (56) In a well reasoned case against a railroad com-

Kentucky: Louisville R. v. McCoy, 81 Ky. 403.

West Virginia: Berns v. Gaston Coal Co., 27 W. Va. 285.

Texas: Texas & Pacific R. v. Huffman, 83 Texas 286; Gulf R. v. Wells, 81 Texas 685; Gulf R. v. McNeill, 25 S. W. 647; Gulf R. v. Schwabbe, 1 Tex. Civ. App. 573; Gulf & W. Texas R. v. Abbott, 24 S. W. 299 (Civ. App.); Eddy v. Adams, 18 S. W. 490.

Kansas: Hanibal & St. Joseph R. v. Kanaley, 39 Kan. 1; Atchison R. v. Wagner, 33 Kan. 660; Kansas City & Pacific R. v. Ryan, 52 Kan. 637.

Arkansas: St. Louis R. v. Jagerman, 59 Ark. 98.

Alabama: Alabama & Florida R. v. Waller, 48 Ala. 459; Smoot v. Mobile & Miss. R., 67 Ala. 13; Louisville & Nashville R. v. Allen, 78 Ala. 494; Louisville & Nashville R. v. Davis, 91 Ala. 487.

United States: Kane v. Railway Co., 128 U. S. 95; Aerkfetz v. Humphreys, 145 U. S. 418; Grand Trunk R. v. Ives, U. S. 417; Chicago R. v. Carpenter, 5 C. C. App. 551.

(56) Connecticut: Hayden v. Smithville Mfg. Co., 29 Conn. 548.

California: Gier v. Los Angeles R., 108 Cal. 129; Beasley v. Fruit Packing Co., 92 Cal. 388; Taylor v. Railway, 45 Cal. 323; Cosgrove v. Pitman, 103 Cal. 268; Beeson v. Green Mt. Gold Mfg. Co., 57 Cal. 20; McGlynn v. Brodie, 31 Cal. 378.

Colorado: Kundell v. Hall, 44 Pacific Rep. 781; Acme Coal Mining Co. v. McIver, 5 Col. App. 267.

Georgia: Baker v. Western R., 68 Ga. 699; Bell v. Western R., 70 Ga. 566.

Iowa: Mayes v. Railroad, 63 Iowa 562; Couch v. Watson Coal Co., 46 Iowa 17; Haworth v. Seever Mfg. Co., 51 N. W. 68; Gorman v. Railroad, 78 Iowa 509; Kroy v. Railroad, 32 Iowa 357; Gorman v. Minneapolis, St. Louis R., 78 Iowa 509; Way v. Railway Co., 40 Iowa 341; Platt v. Railway Co., 84 Iowa 694;

Wells v. Railway Co., 56 Iowa 520; Kuhns v. Railway Co., 70 Iowa 561; Williams v. Railroad, 43 Iowa 396; Muldowney v. Railroad, 36 Iowa 462.

Illinois: Simmons v. Chicago & Tomah R. Co., 111 Ill. 340; Indianapolis R. v. Flanigan, 77 Ill. 365; Pennsylvania Co. v. Lynch, 90 Ill. 333; Honner v. Illinois Central R., 15 Ill. 550; Columbus R. v. Troesch, 68 Ill. 552; Chicago & Northwestern R. v. Moranda, 108 Ill. 576; U. S. Rolling Stock Co. v. Wilder, 116 Ill. 100; Chicago R. v. Troesch, 68 Ill. 545; Stafford v. Chicago, Burlington & Quincy R., 114 Ill. 244; Chicago & Eastern Ill. R. v. Geary, 110 Ill. 383; St. Louis Pressed Brick Co. v. Kenyon, 57 Ill. App. 640; Chicago & Alton R. v. Sullivan, 63 Ill. 293.

Indiana: Indiana, Burlington & Western R. v. Dailey, 110 Ind. 75; La Rose v. Bank, 102 Ind. 332; Ohio & Miss. R. v. Dunn, 138 Ind. 18; Louisville R. v. Breedlore, 10 Ind. App. 657; Chicago & Great Eastern R. v. Harney, 28 Ind. 28; Ohio & Miss. R. v. Collarn, 73 Ind. 261; Evansville & Terre Haute R. v. Guyton, 115 Ind. 450; Lake Shore & Mich. Southern R. v. Steepak, 123 Ind. 210; Pennsylvania Co. v. Roney, 89 Ind. 453; Pittsburg, Fort Wayne R. v. Ruby, 38 Ind. 294; Evansville & Terre Haute R. v. Tohill, 143 Ind. 49.

Kentucky: McDowell v. Railway Co., 5 S. W. 413.

Kansas: Chicago R. v. Doyle, 18 Kan. 58; Kansas Pacific R. v. Peavey, 34 Kan. 472; McQueen v. Railroad, 30 Kan. 689; Jackson v. Railroad, 31 Kan. 761.

Minnesota: Crandall v. McIlrath, 24 Minn. 127.

Massachusetts: Joyce v. City of Worcester, 140 Mass. 245; Pingree v. Leyland, 135 Mass. 398; Moulton v. Gage, 138 Mass. 390; Williams v. Churchill, 137 Mass. 243; Lovejoy v. Boston & Lowell R., 152 Mass. 79; Crowley v. Pacific Mills, 148 Mass. 228; Lovejoy v. Boston & Lowell R., 125 Mass. 82; Whitmore v. Railway Co., 150 Mass. 477; Morse v. Glendon Co., 125 Mass. 282; Gilman v. Railroad, 10 Allen 233 and 13 Allen 433; Keith v. Railroad, 140 Mass. 175; Hall v. Nay, 144 Mass. 186; Peaslee v. Railroad, 152 Mass. 158; Monahan v. City of Worcester, 150 Mass. 439; Makin v. Railroad, 135 Mass. 201; Curran v. Manufacturing Co., 130 Mass. 374; Collon v. Richards, 123 Mass. 484; Keith v. New Haven & Northampton Co., 140 Mass. 175; Peaslee v. Fitchburg R. Co., 152 Mass. 155; Hayes v. Western R. Corp., 3 Cush. 279; Snow v. Housatonic R. Co., 8 Allen 441; Rogers v. Ludlow Mfg. Co., 144 Mass. 198; O'Neil v. O'Leary, 164 Mass. 387; McPhee v. Scully, 163 Mass. 216.

Missouri: Moro v. Pacific Railroad, 49 Mo. 167; Harper v. Ind. & St. Louis R., 47 Mo. 567; Smillie v. St. Bernard Dollar Store, 47 Mo. App. 402; Huffman v. Railroad, 78 Mo. 50; Williams v. Missouri Pacific Railroad, 109 Mo. 475; Kersey v. Kansas City R. Co., 79 Mo. 362; McDermott v. Railroad, 30 Mo. 116; Elliot v. Railroad, 67 Mo. 272; Murphy v. St. Louis I. M. R., 71 Mo. 202; McDermott v. Hanibal & St. Joseph R., 87 Mo. 285; Roblin v. Kansas City R., 119 Mo. 476; Maxwell v. Hanibal & St. Joseph R., 85 Mo. 95; Alcorn v. Chicago & Alton R., 108 Mo. 81; Rains v. Railway Co., 71 Mo. 164; Jackson v. Railway Co., 104 Mo. 448; Cummings v. Collins, 61 Mo. 523; Huler v. Railroad, 67 Mo. 239.

Maryland: Baltimore Elevator Co. v. Neal, 65 Md. 438; Norfolk & Western R. v. Hoover, 79 Md. 253.

Michigan: Michigan Cent. R. v. Gilbert, 46 Mich. 176; Michigan Cent. R. v. Dolan, 32 Mich. 513; Hilts v. Railway Co., 55 Mich. 440; Kean v. Detroit Copper Mills, 66 Mich. 284; Tell v. Railroad, 87 Mich. 574; Davis v. Detroit & Mich. R., 20 Mich. 105; Timni v. Michigan Central R., 98 Mich. 226; Thompson v. Lake Shore & Mich. Southern, 84 Mich. 281.

Maine: Corson v. Maine Central Railroad, 76 Me. 244; Blake v. Maine Central R., 70 Me. 63; Lowler v. Androscoggin R., 62 Me. 467; McDermott v. Railroad, 73 Me. 516; Neilon v. Kansas City R., 85 Me. 599.

New York: Laning v. Railroad, 49 N. Y. 521; Flike v. Railroad, 53 N. Y. 549;

pany, for an injury caused by a conductor, the court remarked that in employing its subordinate it was the duty of the company "to exercise a degree of care commensurate with the responsibilities of the position in which they were placed, and with the consequences that might ensue from incompetence or unskilfulness on the part of those employed. In case peculiar fitness was required, or special qualifications demanded for the service to be performed, unless it was assured by the previous like service of the conductor or his fitness, the duty of the company required it to institute affirmative inquiries in order to ascertain his qualifications in this regard." (57)

Chapman v. Erie R., 55 N. Y., 579; Wright v. Railroad, 25 N. Y. 562; Coon v. Railroad, 6 Barb. 231; Baulec v. Railroad, 59 N. Y. 356; Coppins v. Railroad, 122 N. Y. 557; Haskln v. Railroad, 65 Barb. 129; Harvey v. Railroad, 88 N. Y. 481; Burke v. Railroad, 69 Hun. 21; Sutherland v. Railroad, 125 N. Y. 737; Mann v. Delaware & Hudson Canal Co., 91 N. Y. 495; Booth v. Boston & Albany Co., 73 N. Y. 38; Whittaker v. Delaware & Hudson Canal Co., 126 N. Y. 584; Cameron v. New York Central R., 145 N. Y. 496.

Rhode Island: Gaffney v. New York & N. E. R., 15 R. I. 456; Kelley v. Silver Spring Co., 12 R. I. 112; McGrath v. New York & N. E. R. Co., 14 R. I. 357.

North Dakota: Bennett v. Railway Co., 2 N. Dak. 112.

Texas: Texas & New Orleans R. v. Berry, 67 Texas 238; Houston & Texas Central R. v. Patton, 9 S. W. 175; Gulf R. v. Schwabbe, 1 Texas Civ. App. 573; Campbell v. Wing, 5 Texas App. 431.

Virginia: Norfolk & Western R. v. Nuckols, 21 S. E. 342; Norfolk & Western R. v. Jackson, 85 Va. 489; Norfolk & Western R. v. Cottrell, 82 Va. 512; Norfolk & Western R. v. McDonald, 88 Va. 352.

Tennessee: East Tenn. R. v. McKeney, 15 W. 500.

Arizona: Hobson v. Railway Co., 11 Pa. 545.

West Virginia: Core v. Ohio River Co., 38 W. Va. 456.

Utah: McCharles v. Horn Silver Mining Co., 10 Utah 470.

Wisconsin: Haley v. Western Transit Co., 76 Wis. 344; Disotell v. Henry Luther Co., 90 Wis. 635.

Vermont: Noyes v. Smith, 28 Vt. 63; Latremonille v. Railroad, 63 Vt. 336.

Ohio: Mad River & Lake Erie R. v. Barber, 5 Ohio St. 541; Lake Shore & Michigan Southern R. v. Knittal, 33 Ohio St. 468.

Pennsylvania: Snodgrass v. Carnegie Steel Co., 173 Pa. 228; Pennsylvania R. Co. v. Book, 57 Pa. 339; Rummell v. Dilworth, 111 Pa. 349; Huntingdon & Broad Top R. v. Decker, 82 Pa. 119 and 84 Pa. 419; Frazier v. Pennsylvania R., 38 Pa. 104; Reiser v. Pennsylvania Co., 152 Pa. 38; Johnston v. Pittsburg & W. R., 114 Pa., 443; Philadelphia & Reading R. v. Trainor, 137 Pa. 148; Lewis v. Seifert, 116 Pa. 628; Weger v. Railroad, 55 Pa., 460; Lebbering v. Struthers, Wells Co., 157 Pa., 312; Ardesco Oil Co. v. Gilson, 63 Pa. 146, 150.

United States: Northern Pacific R. v. Herbert, 116 U. S. 655; Wabash Railway v. McDaniels, 107 U. S. 454; Melville v. Railroad, 48 Fed. 820; Ross v. Chicago, etc., R., 8 Fed. 544; Baltimore & Ohio R. v. Henthorne, 73 Fed. 634; Baltimore & Ohio R. v. Camp, 65 Fed. 952; New York & Texas Steamship Co. v. Anderson, 50 Fed. 462; Wabash & Western R. v. Brow, 65 Fed. 941; Townsend v. Langles, 41 Fed. 919; Tuttle v. Railway Co., 122 U. S. 195; Randall v. Baltimore & Ohio R., 109 U. S. 478; Brooks v. Railway Co., 47 Fed. 687.

(57) Indiana: Cincinnati R. v. Harney, 28 Ind. 28.

New York: Wright v. New York Central R. 25 N. Y. 562; Baulec v. New York & Harlem R., 59 N. Y. 356; Coppins v. New York Central R., 122 N. Y. 557; Laning v. Railroad, 49 N. Y. 521; Flike v. Boston & Albany R., 53 N. Y. 543.

In *Gilman v. Eastern Railroad* (58), the court declared that a master was bound to use ordinary care in providing proper servants to carry on his business, and was liable to any fellow-servants for his negligence in this respect. This care he could and must exercise in keeping and maintaining such servants and engines. If he knew, or in the exercise of due care might have known, that his servants were incompetent, either at the time of procuring them or at any subsequent time, he failed in his duty. In this case the railroad company employed a flagman who, it was contended, was an habitual drunkard. To employ such a man, especially for these positions, clearly was negligence. The fact that he was a man of this character was decided by the jury against the company, whose verdict was not disturbed by the court of review. "A railroad corporation," said the court, "is bound to provide proper road machinery and equipment and proper servants. It must do this through appropriate officers. If acting through appropriate officers, it knowingly or negligently employs incompetent servants, it is liable for an injury occasioned to a fellow-servant by this incompetency. If it continues in its employment an incompetent servant after his incompetency is known to its officers, or so manifest that its officers using due care, would have known, such continuance in employment is as much a breach of duty and a ground of liability as the original employment of an incompetent servant."

In applying this rule there is difficulty, for all have not the same mind concerning the facts relating to one's competency. In one of the cases against a railroad company, Justice Allen remarked that the duty of a railroad corporation was to exercise due, that is, ordinary care, in the selection and employment of its servants and

Massachusetts: *Snow v. Housatonic R.*, 8 Allen 441; *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198; *Cayzer v. Taylor*, 10 Gray 274; *Albro v. Agwam Canal Co.*, 6 Cush. 75, 77.

Illinois: *Chicago R. v. Troesch*, 68 Ill. 545.

Missouri: *Moss v. Pacific R.*, 49 Mo. 167; *McDermott v. Railroad*, 30 Mo. 116; *Elliot v. Railroad*, 67 Mo. 272.

Pennsylvania: *Philadelphia & Reading R. v. Trainor*, 137 Pa. 148; *Lewis v. Seifert*, 116 Pa. 628; *Weger v. Railroad*, 55 Pa., 460; *Lehigh Valley Coal Co. v. Jones*, 86 Pa., 432, 439; *Philadelphia & Reading R. v. Hughes*, 119 Pa. 301; *O'Donnell v. Allegheny R.*, 59 Pa. 239; *Caldwell v. Brown*, 53 Pa. 453, 456; *Philadelphia, Wil. & Balt. R. v. Keenan*, 103 Pa. 124; *Green & Coates St. Pass. R. v. Bresmer*, 97 Pa. 103; *Patterson v. Pittsburg & Connellsville R.*, 76 Pa. 389; *Penn. & N. Y. Canal & R. v. Mason*, 109 Pa. 296; *Schall v. Cole*, 107 Pa. 1; *Allison Mfg. Co. v. McCormick*, 118 Pa. 519; *Rumrill v. Dilworth*, 111 Pa. 343; *s. c.* 131 Pa. 509; *Keyes v. Pennsylvania R.*, 3 At. Rep. 15.

Virginia: *Norfolk & Western R. v. Nuckols*, 21 S. E. Rep. 342.

New Hampshire: *Fifield v. Northern R.*, 42 N. H. 225.

California: *Gier v. Los Angeles Co.*, 108 Cal. 129.

United States: *Wabash R. v. McDaniels*, 107 U. S. 454.

(58) 13 Allen 433, 440.

agents, having respect to their particular duties and responsibilities and the consequences that might result from the want of competence, skill or care in the performance of their duties. "If, without exercising such care and caution, employes and agents are selected who are incompetent, or in any respect unfitted for the position, and harm and loss comes to others by reason of such incompetency or unfitness, the corporation must answer for their neglect and want of care in employing a servant incompetent or untrustworthy." (58) In another case the Supreme Court of Missouri declared that it was the duty of the defendants' officers to employ proper servants, but the duty was not an absolute one. If they made careful inquiry into the habits and competency of the men employed, and upon such inquiry believed and had reason to believe them to be sober, competent and careful they could do no more. (59)

The remarks of the Supreme Court of Michigan are well worth adding: "While we only say as a general proposition that the degree of care required in all cases is that which men of ordinary care and prudence exercise, yet it is to the business itself that we must look when we desire to ascertain whether such care and prudence have or not been exercised in a given case. Ordinary care and prudence, or what might clearly be considered such, in a given case, might, if applied in like manner, where the hazard and responsibility was greater, fall far short, or be grossly negligent. A man might be fully qualified to act as yard-master at a small unimportant station who would be wholly unfitted to take charge of a large yard with many tracks and where a large number of trains were arriving and departing each day." (60)

3. The law presumes that an employer has selected competent employes. Having done so the master may rely on their competency until he has received notice of a change. If an employe is not competent, the burden of proof is on the party who makes the charge. (61) He must show that the employer knew, or would have known, had he exercised proper care and diligence, of the incompetency of the servant thus charged. (62)

4. Nevertheless, though an employe is competent, or fit for his employer's service when hired, and no presumption of unfitness afterward arises, yet the master cannot shut his eyes, close his

(58) *Gilman v. Eastern R.*, 13 Allen 433, 440.

(59) *Moss v. Pacific R.*, 49 Mo. 167, 170.

(60) *Michigan Central R. v. Gilbert*, 46 Mich. 176, 179.

(61) *Blake v. Maine Central Co.*, 70 Me. 64; *Chapman v. Erie R.*, 55 N. Y. 79.

(62) *Blake v. Maine Central R.*, 70 Me. 63; *Lawler v. Railroad*, 62 Me. 467; *Harper v. Railroad*, 47 Mo. 567; *Moss v. Railroad*, 49 Mo. 167.

ears and rest in peaceful security, unconscious and indifferent to what may thereafter take place. (63)

5. Finally, to charge effectively a master with negligence for employing incompetent servants, the person injured must show that his injury was caused by the incompetency of the person employed. Thus, a fireman was employed to operate an engine who was not qualified, for he was a machinist. Yet, the court declared "that if he handled the engine as carefully and prudently as an engineer of ordinary care and prudence would have done under the circumstances," then another employe could not recover of the employer, "even if the jury should believe that he was not well qualified for the work to be done." (64)

6. In attempting to prove that a servant is incompetent, the Supreme Court of Pennsylvania has declared that incompetency cannot be established by any of such acts, but must be by evidence of genuine reputation. As this rule has been repudiated by other courts, we will give Chief Justice Lowrie's reasons for the decision: "Character for care, skill and truth of witnesses, parties or others, must all alike be proved by evidence of general reputation, and not of special acts. Character grows out of special acts, but is not proved by them. Indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established. And sometimes the very frailties that may be proved against a man may have been regarded by him in so serious a light as to have produced great improvement of character. Besides this, ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law demands only the ordinary." (65)

7. The New York Court of Appeals has reasoned very differently. In *Baulec v. New York & Harlem R.* (66), Justice Allen said: "When, as here, the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence with proof that the principal had knowledge of such acts. The cases in which evidence of other acts of misconduct or neglect of servants or employes whose acts and omissions of duty are the subject of investigation, have been held incompetent, have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion, by showing similar acts of negligence on other occasions. This class of cases does not bear upon the case in hand, and may be laid out of view. Proof of specific acts of negligence of a servant or agent on one or more occasions does not tend to prove negligence on the par-

(63) *Michigan Central R. v. Gilbert*, 46 Mich, 176, 179.

(64) *Gulf R. v. Schwabbe*, 1 Texas Civ. App. 573.

(65) *Frazier v. Pennsylvania R.*, 38 Pa. 104.

(66) 59 N. Y. 356, 360.

ticular occasion, which is the subject of injury. (67) Where character as distinguished from reputation is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation, or want of adaptation to any position, or fitness or unfitness for a particular duty or trust. It is by many, or by a series of acts that individuals acquire a general reputation, and by which their characters are known and described, and the actual qualities, the true characteristics of individuals, those qualities and characteristics which would and should influence and control in the selection of agents for positions of trust and responsibility, are learned and known. A principal would be without excuse should he employ for a responsible position, on the proper performance of the duties of which the lives of others might depend, one known to him as having the reputation of being an intemperate, imprudent, indolent or careless man. He would be held liable to the fellow-servants of the employe for any injury resulting from the deficiencies and defects imputed to the individual by public opinion and general report. Still more should he be chargeable if he had knowledge of specific acts showing that he possessed characteristics incompatible with the duties assigned to him and which might expose his fellow-servants and others to peril and harm. *Frazier v. Pennsylvania R.* (68), is adverse to these views. It is safe to say that this decision has not been received with approval by the profession."

In the case of *Pittsburg R. v. Ruby* (69), the *Frazier* case was severely criticised. The effect of the ruling in that case was declared to be that a railroad corporation could not be charged with notice of the incompetency of one of its employes, by proof of special instance of want of care, skill and capacity, although all the acts were well known to the directors, president and superintendent, and that the only mode in which such proof could be made was by proof of general character. "This case stands alone," says the court, "unsustained and unsupported, so far as we have been able to discover, by any elementary work or decision. Nor can the decision be sustained by reason or on principle. Under the operation of that rule, corporations would, in many instances, be relieved of responsibility for injuries received, resulting from the reckless

(67) *Evansville & Terre Haute R. v. Guyton*, 115 Ind. 450; *Baltimore Elevator Co. v. Neal*, 65 Md. 438; *Couch v. Watson Coal Co.*, 46 Iowa 17; *Huffman v. Railroad*, 78 Mo. 50.

(68) 38 Pa. 104.

(69) 39 Ind. 294, 317.

Baird Halberstadt,
Pottsville,

Pa.

conduct of such corporations in employing and retaining negligent, careless and unskilled persons to run and operate railroads." (70)

8. The Pennsylvania view, however, is supported in Massachusetts. In *Hatt v. Hay* (71), the plaintiff was injured through the negligence of the defendant's foreman. Though permitted to show that the foreman's reputation for competency was bad, he was not permitted to prove specific acts of carelessness on the part of the foreman while engaged on the same task, and before the accident happened. The court, speaking through Justice Devens, remarked that because a servant may have been guilty of negligence on certain specified occasions, it by no means follows that he was on the occasion in question, or that he might not ordinarily be a careful and skilful workman, and properly employed as such. "The investigation of other individual acts of alleged carelessness on the foreman's part would necessarily have a tendency to confuse the case by collateral inquiries, to protect it indefinitely if these inquiries were carefully made, and to mislead and distract a court or jury from the true issue." (72)

9. The rule established in Michigan seems based on the soundest wisdom. By the Supreme Court of that state it is held that while the negligence of a servant in a particular instance cannot well be shown by testimony of his competency or carelessness on other occasions, such testimony may be used to show that the master was chargeable with negligence in retaining the servant. In the case in which the principle was applied the court remarked that it was incumbent on the plaintiff to show that the defendant was guilty of negligence in first employing the incompetent servant, causing the controversy, because he was unfitted for his position, or in afterwards retaining him. "This he could do by showing specific acts of incompetency, and bringing them home to the knowledge of the company, or by showing them to be of that nature, character and frequency that the company, in the exercise of due care on its part, must have brought them to its notice." (73)

10. An employe is warranted in assuming that the master has employed competent servants until notice to the contrary is brought home to him. It was, indeed, contended on one occasion that an

(70) *Gier v. Los Angeles Electric Co.*, 108 Cal. 134; *Nofsinger v. Goldman*, 122 Cal. 609; *Couch v. Watson Coal Co.*, 46 Iowa 22; *Doris v. Detroit R.*, 20 Mich. 124; *Wabash Western R. v. Brow*, 65 Fed. 941; *Baltimore R. v. Camp*, 65 Fed. 958; *Grube v. Mo. Pacific R.*, 98 Mo. 330; *O'Hare v. Chicago R.*, 95 Mo. 662; *Baltimore Elevator Co. v. Neal*, 65 Md. 452; *Norfolk R. v. Hoover*, 79 Md. 253.

(71) 144 Mass. 186.

(72) *Kennedy v. Spring*, 160 Mass. 203; *Connors v. Morton*, 160 Mass. 333; *Driscoll v. Fall River*, 163 Mass. 105; *Olsen v. Andrews*, 168 Mass. 265; *Galveston R. v. Davis*, 48 S. W. Rep. 570 (Texas).

(73) *Michigan Central R. v. Gilbert*, 46 Mich. 176, 179; *Hilts v. Chicago & Grand Trunk R.*, 55 Mich. 444.

operative was bound to investigate and find out whether his employer had used reasonable care in selecting other employes in the same branch of service. The court declared that the law imposed no such duty on the employe. "One thus employed is warranted in assuming that the master has discharged his duty in this respect, and until notice to the contrary is brought home to the employe, he may safely act upon that hypothesis." (74)

11. The general policy of advancing men from lower to higher position is in harmony with the rule of requiring employes to observe ordinary care in selecting their employes. Thus, in one of the cases the counsel for a company asked that the jury might be instructed that it was wise for corporations to take men employed by them from inferior positions and put them in higher ones, "as they thus held out the highest inducement to those in their employ to become skilful and faithful in the performance of their duties."

The court of review declared that this instruction was "unobjectionable," though the wisdom of a policy concerning the management of a business was a question of fact rather than of law. (75) Such a policy, however, has the approval of other courts, though not all. (76)

Section 3.

The Selection of Suitable Appliances.

1. The term "appliances of a business," so the court said on one occasion, includes premises, machinery of every kind, and also the persons who are employed to operate them. (77) The term, therefore in this connection has a broad significance. Thus, when it is the duty of a railroad to transport employes over its track to and from their place of work, the track is an appliance and must be suitable for the purpose (78), while a track in process of construction is not thus regarded. Says the Supreme Court of Texas: "Train men are not required to examine the track for defects, and are held to assume the only danger resulting from such as are actually known to them, and such as are so patent as to make it negligence on their part not to see them. They have the right to assume that

(74) U. S. Rolling Stock Co. v. Wilder, 116 Ill. 100, 109.

(75) Evansville & Terre Haute R. v. Guyton, 115 Ind. 450, 457.

(76) Texas R. v. Berry, 67 Texas, 238; Haskin v. Railroad, 65 Barb. 129.

(77) Johnson v. Ashland Water Co., 71 Wis. 557.

(78) Brick v. Rochester R., 98 N. Y. 211, 215; Walling v. Construction Co., 41 Car. 388; Texas R. v. Vallie, 60 Texas 481; Snow v. Housatonic R., 8 Cush. 441; Fifield v. Northern R., 42 N. Hamp. 223.

the master has performed his duty in providing them with an ordinarily safe track." (79)

2. An employer must select suitable appliances for the service that is to be performed by his employes. The rule has been thus stated by Chief Justice Bigelow of the Supreme Court of Massachusetts: (80) "The employer or master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and will also take due precaution to adopt and use such machinery, apparatus, tools, appliances and means as are suitable and proper for the prosecution of the business in which his servants are engaged with a reasonable degree of safety to life and security against injury. Thus, an owner of a steamboat would be liable to an engineer or workman in his employment for an injury occasioned by the use of a boiler which was clearly defective and insufficient. So a manufacturer would be subjected to a like liability by the use of imperfect or badly constructed machinery. And in like manner the proprietors of a railroad would be responsible for accidents happening by tracks improperly laid, or switches which were not constructed to operate with regularly and precision.

"The distinction on which this rule of law is founded is an eminently wise and just one. It is this: A workman or servant, on entering upon any employment is supposed to know and to assume the risks naturally incident thereto; if he is to work in conjunction with others he must know that the carelessness or negligence of one of his fellow-servants may be productive of injury to himself; and, besides this, what is more material, as affecting his right to look to his employer for damage for such injuries, he knows or ought to know that no amount of care or diligence by his master or employer can by possibility prevent the want of due care and caution in his fellow-servants, although they have been reasonably fit for the service in which they are engaged.

"It is certainly most just and reasonable that consequences which the servant or workman must have foreseen on entering into an employment, and which due care on the part of the employer or master could in no way prevent, should not be visited on the latter. But it is otherwise where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of a work. The use of these they would not foresee. The legal implication is, that the employer will adopt suitable instruments and means with which to carry on his business.

(79) *Fort Worth R. v. Wilson*, 3 Texas Civ. App. 583, 587; *Railway v. Aylward*, 79 Texas, 675; *Railway v. Taylor*, 79 Texas 104; *Railway v. McNamara*, 59 Texas 255.

(80) *Snow v. Housatonic R.*, 8 Allen 445.

These he can provide and maintain by the use of suitable care and oversight; and if he fails to do so he is guilty of a breach of duty under his contract, for the consequences of which he ought in justice and sound reason to be responsible."

3. In providing suitable appliances, etc., it is not always needful to provide the newest, or those that will protect employes the most completely from accident. The courts are in harmony in their statement of this principle. (81) Says the Supreme Court of Pennsylvania: "Some employments are essentially hazardous, and it by

(81) Colorado: Burlington R. Co. v. Liehe, 17 Colo. 280.

Connecticut: Wilson v. Willimantic Linen Co., 50 Conn. 433.

Georgia: Georgia Railroad & Banking Co. v. Nelms, 83 Ga. 70.

Indiana: Columbus R. v. Arnold, 31 Ind. 174; Lake Shore R. v. McCormick, 74 Ind. 440; Indiana Car Co. v. Parker, 100 Ind. 181; Pennsylvania Co. v. Whitcomb, 111 Ind. 212; Cincinnati R. v. McMullen, 117 Ind. 439; Cincinnati R. v. Roesch, 126 Ind. 445.

Illinois: Indianapolis R. v. Foy, 81 Ill. 474; Chicago R. v. Avery, 109 Ill. 314; Kranz v. White, 8 Ill. App. 583; Richardson v. Cotper, 88 Ill. 270; Pennsylvania Co. v. Lynch, 90 Ill. 333; Camp Point Mfg. Co. v. Ballore, 71 Ill. 417; Norway v. Jensen, 52 Ill. 373; Wabash R. v. Moran, 13 Ill. 72.

Iowa: Greenleaf v. Railroad, 29 Iowa 14; Burns v. Railroad, 69 Iowa 450; Hathaway v. Illinois Central R., 60 N. W. 651.

Alabama: Georgia Pacific R. v. Brooks, 84 Ala. 138.

California: Martin v. California Central R., 94 Cal. 326.

Kansas: Atchison R. v. Lannigan, 42 Pac. 343; Chicago v. Blevins, 46 Kan. 370.

Massachusetts: Donahue v. Brown, 154 Mass. 21; Mooney v. Conn. River Lumber Co., 154 Mass. 407; Toy v. U. S. Cartridge Co., 159 Mass. 313; Robinson v. Blake Mfg. Co. 143 Mass. 528; Elmer v. Locke, 135 Mass. 575; Lawless v. Railroad, 136 Mass. 1; Gilman v. Eastern R., 10 Allen 233; Snow v. Housatonic R., 8 Allen 441.

Minnesota: Eicheler v. Hauggi, 40 Minn. 263; Eicheler v. St. Paul Furniture Co., 40 Minn. 263.

Maryland: Wonder v. Baltimore & Ohio R., 32 Md. 418; Baltimore & Ohio R. v. Stricker, 51 Md. 47.

Missouri: Johnson v. Missouri Pacific R. Co., 96 Mo. 340; Steinhauer v. Spraul, 114 Mo. 551.

Maine: Wormell v. Railroad, 79 Me. 404.

New York: Gordon v. Reynolds Card Mfg. Co., 47 Hun 278; Jacobson v. Cornelius, 42 Hun. 377.

Ohio: Mad River R. v. Barber, 5 Ohio St. 541; Pittsburg R. v. Henly, 48 Ohio St. 608.

Pennsylvania: McCombs v. Railroad, 130 Pa. 182; Payne v. Reese, 100 Pa. 301; Pittsburg & Chicago R. v. Sentmeyer, 92 Pa. 276; Lehigh Coal Co. v. Hayes, 128 Pa. 294.

South Carolina: Gunter v. Graniterville Mfg. Co., 18 S. Car. 262.

Texas: Martin v. Wrought Iron Range Co., 23 S. W. 387.

Wisconsin: Corcoran v. Mil. Gas Light Co., 81 Wis. 191; Thompson v. Herman, 47 Wis. 602.

Washington Territory: Columbia Co. v. Hawthorne, 3 Wash. T. 353.

United States: Washington R. v. McDade, 135 U. S. 554; Hough v. Railroad, 100 U. S. 213; Naylor v. New York Central R., 33 Fed. 801.

no means follows that an employer is liable because a particular accident might have been prevented by some special device or precaution not in common use. All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of the implement, or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held to a higher degree of skill than the fair average of his trade or profession, and the standard of due care is the conduct of the average prudent man. The test of negligence as to employers is the same; and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed." (82)

Justice Danforth, in speaking for the New York Court of Appeals, has said: "A master is not bound to furnish the best of known or conceivable appliances; he is required to furnish such as are reasonably safe (83), and to see that there is no defect in those which his employe must use. (84) The test is not whether the master omitted to do something he could have done, but whether, in selecting tools and machinery for their use, he was reasonably prudent and careful; not whether better machinery might not have been obtained, but whether that provided was in fact adequate and proper for the use to which it was to be applied." (85)

The statement of the rule by Justice Ellsworth in one of the earlier cases has been often quoted, that a mill owner is not required to furnish his mill "with the most approved machinery, or machinery which would be operated with less hazard, for every man may judge how he will carry on his own business, and workmen having knowledge of the circumstances must exercise their judgment whether they will enter or continue in his service; but as we regard the law,

(82) *Titus v. Bradford R.*, 136 Pa. 618.

(83) *Burke v. Witherbee*, 98 N. Y. 562; *Probst v. Delamater*, 100 N. Y. 266.

(84) *Gottlieb v. Railroad*, 100 N. Y. 462.

(85) *Stringham v. Hilton*, 111 N. Y. 188, 195; *Develin v. Smith*, 89 N. Y. 470; *Sweeney v. Envelope Co.*, 101 N. Y. 520; *Bajus v. Syracuse R.*, 103 N. Y. 312; *Hickey v. Taafe*, 105 N. Y. 26; *Buckley v. Railroad*, 113 N. Y. 540; *Dobbins v. Brown*, 119 N. Y. 188; *Cosulich v. Standard Oil Co.*, 122 N. Y. 118; *Kern v. De Castro Co.*, 125 N. Y. 50; *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273; *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31.

there must be a culpable neglect; an omission of duty towards an employe conversant with the machinery in use, and the hazards attending the prosecution of the business." (86)

In the case of the *Lake Shore R. v. McCormick* (87), the court said: "The master's obligation is not to supply the servant with absolutely safe machinery, but his obligation is to use ordinary and reasonable care, not to subject the servant to extraordinary and unreasonable danger. When a master employs a servant to do a particular kind of work with a particular kind of implements and machinery, the master does not agree that the implements and machinery are free from danger in their use, but he agrees that such implements and machinery to be used by such servant are sound and fit for the purpose intended, so far as ordinary care and prudence can discover, and that he will use ordinary care and prudence in keeping them in such condition and fitness; and the servant agrees that he will use such implements and machinery with care and prudence; and if, under such conditions and circumstances, harm or injury come to the servant, it must be ranked among the accidents the risk of which the servant must be deemed to have assumed when he entered into such service.

"Neither companies nor individuals are bound, as between themselves and their servants, to discard and throw away their implements or machinery upon the discovery of any new invention which may be thought or claimed to be better than those they have in use; but if they take ordinary care and exercise ordinary prudence to keep their implements or machinery in sound repair, so that harm does not result to the servant for want of such sound condition of the implements or machinery used, then such individuals or companies will not be responsible to servants for any injury which may occur to them in the use of such implement or machinery."

President Lewis, of the Supreme Court of Virginia, expresses the rule thus concerning a railroad company: "It is not required to change its machinery in order to apply every new invention or supposed improvement in appliance, and it may even have in use a machine or appliance for its operation, shown to be less safe than another in use, without being liable to its employes for the non-adoption of the improvement, provided that the employe be not deceived as to the degree of danger that he incurs." (88)

In considering the test required of a mine owner, a recent court says: "An employer is bound to furnish machinery and appliances

(86) *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548, 557.

(87) 74 Ind. 447.

(88) *Darracott v. Chesapeake & Ohio R.*, 83 Va., 294, citing *Hough v. Railroad*, 100 U. S. 100; *Lovejoy v. Boston & Albany R.*, 25 Mass., 79; *Michigan Central R. v. Smithson*, 45 Mich. 212.

that are of ordinary character and reasonable safety. And the former is the conclusive test of the latter. Whatever is according to the general usual and ordinary course adopted by those in the same business is reasonably safe within the meaning of the law. The test is general use." (89) Whether the drift in the defendant's mine was timbered up in the usual and ordinary way was a question for the jury, (90)

Again, "when an appliance not obviously dangerous has been in daily use for a long time and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of imprudence or carelessness." (91)

The qualification in the rule should be noticed: "not obviously dangerous." An appliance may be obviously dangerous and yet be used daily for a long time. When in this condition the above rule can not be invoked by the employer. It was, however, in a case in California, with respect to a defective hook that had been suspended for a long time without accident. The court remarked that "that circumstance was only a matter of wonderment, and was an instance of how good luck will sometimes protect carelessness for long periods." (92)

The rule everywhere prevails that an employer need not adopt the newest or safest appliances, and the test is common use. On the other hand, it is said that an employer cannot disregard all the inventions for securing the safety and comfort of his men. As new inventions appear they come into use, employers that are the most progressive, and that often have the largest means, adopt them and others follow, and by and by their use becomes general. It must be, therefore, in the introduction of any new machine or appliance or safety device there is a time when its use and non-use may be perhaps equal—many use it, and many do not. What rule shall be applied to these cases? Shall it be said that if an appliance is use quite generally, that will suffice? Evidently there is a dividing line which cannot be covered by any rule. (93)

To this rule may be added another which may be stated in the words of Justice Earl. "It must always be true that where several

(89) *Mason v. Fourteen Mining Co.*, 82 Mo. App. 367, 370, the court citing *Ship Building Works v. Nuttall*, 119 Pa. 149; *Northern Central R. v. Husson*, 101 Pa. 1; *Kohler v. Schwenk*, 144 Pa. 348; *Titus v. Bradford R.*, 136 Pa. 618; *Reese v. Hershey*, 163 Pa. 263; *Jones v. Lumber Co.*, 58 Ark. 125; *Railway v. Allen*, 78 Ala. 494; *Railway v. Huntley*, 38 Mich. 537.

(90) *Mason v. Fourteen Mining Co.*, 82 Mo. App. 367; *Huhn v. Railway*, 92 Mo. 448; *O'Millia v. Railway*, 115 Mo. 205.

(91) *Danforth, J., Stringham v. Hilton*, 111 N. Y. 188.

(92) *Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190; *Columbia R. v. Hawthorne*, 3 Wash. T. 353.

(93) See *Huhn v. Mo. Pacific R.*, 92 Mo. 440; *Richmond & Danville R. v. Jones*, 92 Ala. 218; *Georgia Pacific R. v. Propst*, 83 Ala. 518; *Railroad v. Allen*, 78 Ala. 494.

appliances are in use, each of which is regarded by men of skill and experience as safe and proper, the master cannot be made liable for an injury to one of his servants, if in selecting the particular appliance he takes what, according to his judgment, is the best or most suitable, guided by his experience and observation, and those of the skilled men in his employment." (94)

4. The employer's duty to furnish reasonably safe instrumentalities for the use of his employes does not require him to attend to, or secure the proper regulation of those parts which necessarily have to be adjusted in the course of their use. Thus, if a saw is provided with a movable gauge, it is not the duty of the employer to attend to the proper setting of this gauge for the use of the servant who is to operate the same. Of course, we are assuming that the operator is an adult and possessing requisite knowledge to use a saw of this nature. (95)

The rule that governs employed and employer in such cases is this: If the change in a machine is merely an ordinary adaptation of it to the purpose for which it was made, then the operator is required to make it, and assume the risk growing out of the change; on the other hand, if the change is one that is unknown in the ordinary use of the machine, and is made to adapt it temporarily to a special and unusual purpose, then it is the duty of the employer to notify the employe of the change, so that he may be prepared for it. Justice Hammersley has stated the rule in a recent case relating to a machine for making paper: "If the change in the machine in question was merely an adaptation of the machine to the purpose for which it was made, which a skilled operator must be presumed to anticipate—such, for instance, as the slight change necessary to keep the felt bands at proper tension—the risk of injury was one assumed by the plaintiff in accepting his employment. On the other hand, if the change was one unknown in the ordinary use of the machine, made to adapt it temporarily to a special and unusual purpose, calling for a difference in operation, and greatly increasing the danger, then it was the duty of the defendant to notify the plaintiff before requiring him to operate the machine in its altered condition." (96)

5. If a servant undertake to use machinery or appliances for other purposes than those intended, and for which the employer had no reason to suppose they would be used, and he is injured thereby, it is his own folly for which there is no redress. This has been especially applied to the use of elevators in mills, which are de-

(94) *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31, 36.

(95) *Eicheler v. Hauggi*, 40 Minn. 263.

(96) *Ryan v. Chelsea Paper Mfg. Co.*, 69 Conn. 454; *O'Keefe v. Paper Co.*, 66 Conn. 38, 45.

signed for carrying goods, etc., and not passengers, but in which employes persist in riding. (97)

6. As a part of an employer's duty to select suitable appliances and machinery and assign or prepare safe places for work for his employes, it is his duty in many cases to guard or protect such appliances, machinery or places from danger. The same rule must logically apply in performing this duty as in the work of selection or preparation in the beginning. In other words, it is a part of the same duty, and, therefore, the same degree of care, considering all the circumstances, must be exercised in doing the one thing as in doing the other. Chief Justice Ruger has well expressed the rule: "Those dangers which are known and can be mitigated or avoided by the exercise of reasonable care and precaution on the part of those carrying on the business, and injuries from which happen through neglect to exercise such care, are not incident to the business, and the master is generally liable for damages occurring therefrom." And in the same case the court further remarked that "when directing the performance of work by the servant in a place which may become dangerous, and such danger may be foreseen and guarded against by the exercise of reasonable care and prudence on the part of the master, it is his duty to exercise such care and adopt such precautions as will protect the servant from avoidable danger. This is the master's duty, and however he may choose to exercise it, whether through the supervision of a superintendent or some lower grade of employment, it still continues his duty, and not until he shows that it has been properly performed, can he claim exemption from liability for injuries occasioned by the non-performance." (98)

Nevertheless, in many cases, machinery is not covered, and it is said in the way of defence that the employer has the right to conduct his business as he pleases so long as he does not violate any positive law. It must, however, be understood that while he may do so, yet if he uses machinery that is dangerous without it, or exposes his employes to any danger that is unusual without telling them of it, unless the danger is obvious, or ought to be known by them, he is liable for the consequences.

(97) *Felch v. Allen*, 98 Mass. 572; *Duffy v. Upton*, 113 Mass. 544; *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374; *Colyer v. Pennsylvania R.*, 49 N. J. Law 59; *Illinois Central R. v. Daniels*, 19 So. Rep. 830 (Miss.); *Hart v. Naumburg*, 123 N. Y. 641; *Stringham v. Hilton*, 111 N. Y. 188; *Hussey v. Cogger*, 112 N. Y. 614; *Stetler v. Chicago & Northwestern R.*, 46 Wis. 497; *Preston v. Chicago & Northern R.*, 98 Mich. 128; *Stather v. Ness*, 42 Minn. 379; *Hamilton v. Richmond & Danville R.*, 83 Ga. 346; *Durgin v. Munson*, 9 Allen 396.

(98) *McGovern v. Central Vt. R.*, 123 N. Y. 280; *Laning v. New York Central R.*, 49 N. Y. 521; *Corcoran v. Holbrook*, 59 N. Y. 517.

Section 4.

The Employer's Duty to Make Repairs.

1. If it be an employer's duty to furnish suitable appliances, machinery, etc., for the use of his men in the beginning, the duty clearly would seem to be a continuing one so long as they are in use; and this is the view maintained by most, but not all, of the courts. The principle had been clearly stated by the Supreme Court of Maine. "The same care requisite in hiring a servant in the first instance must still be exercised in continuing him in the service; otherwise the employer will become responsible for his want of care or skill. The employer will be equally liable for the acts of an incompetent or careless servant whom he continued in his employment after a knowledge of such incompetency or carelessness, as when in the exercise of due care he should have known it, as if he had been wanting the same care in hiring. The same may very properly be said of machinery." (99)

"It is well settled by all the authorities," says Justice Morse, "that the master must provide his servant with a safe place to work in, and furnish him with suitable machinery and appliances with which to perform such work, and it is his duty to keep such machinery and appliances in good repair. If he cannot do this himself personally, he must provide some other person to take his place in this respect; and the person to whom the master's duty is thus delegated—no matter what his rank or grade; no matter by what name he may be designated—cannot be a servant in the sense or under the rule applicable to injuries occasioned by fellow-servants. Such person is an agent, and the rules of law applicable to principal and agent must apply.

"If the master can delegate this duty to an employe, and apply the doctrine of fellow-servant to such an employe because he is working in and about the same business, and in the same general line of such business, as in this case, the manufacture and piling of lumber, then the employer is permitted to shirk his duty upon another, and then allowed to escape all responsibility and liability upon the plea that the person injured is the fellow-servant of his delegate or agent. The law, as I understand it, will not permit this. It is a duty the master owes which he cannot delegate to a fellow-servant of his employes. If he picks out one of the men working about his mill, and imposes upon him the duty of seeing that the machinery is kept in safe repair, or delegates to one of the men working in the mill yard the duty of seeing that their docks are kept safe and sound, these men, as far as these duties are con-

(99) *Shanny v. Androscoggin Mills*, 66 Me. 420, 425; *Lewis v. St. Louis R.*, 59 Mo. 495; *Hough v. Railway Co.*, 100 U. S. 213, 217.

cerned, stand in the place of their employer, and their negligence." (100)

In like manner the Supreme Court of Indiana has remarked: "An employer is required not only to furnish reasonably safe and suitable tools and machinery, but to exercise such a continuing supervision over them by such reasonably careful and skilful inspection which employes are required to use in such a connection as not unnecessarily to expose them to unknown and extraordinary ills." (101)

Indeed, with the exception of perhaps Massachusetts, an employer's duty to keep his appliances and machinery in reasonable repair is just as imperative as the duty to furnish suitable appliances and machinery in the beginning. In other words, the duty to furnish suitable means to one's employes for doing their work is a continuing one. How extensively this rule prevails will be seen by examining the cases cited in the note. (1)

2. If appliances or machinery become impaired, and the user of

(100) *Van Duren v. Betellier*, 78 Mich. 492, 502, the court citing *Rodman v. Railroad*, 55 Mich. 57, s. c. 59 Mich. 395; *Slater v. Chapman*, 67 Mich. 523; *Baldwin v. Railroad*, 75 Iowa 297; *Capper v. Railroad*, 103 Ind. 305; *Northern Pacific R. v. Herbert*, 116 U. S. 642; *Railroad v. Jones*, 30 Kan. 601; *Luke v. Mining Co.*, 71 Mich. 364.

(101) *Ohio & Miss. R. v. Peavey*, 128 Ind. 197, 203.

(1) *Arkansas: St. Louis R. v. Harper*, 44 Ark. 524.

California: Beeson v. Green Mt. Mining Co., 57 Cal. 20.

Indiana: Indiana Car Co. v. Parker, 100 Ind. 181; *Ohio & Miss. R. v. Peavey*, 128 Ind. 197; *City of Indianapolis v. Scott*, 72 Ind. 196; *Board of Commissioners v. Bacon*, 96 Ind. 31.

Iowa: Braun v. Chicago & Burlington R., 53 Iowa 595; *Thalman v. Moeller*, 73 Iowa 108.

Kansas: Atchison R. v. Moore, 29 Kan. 632.

Illinois: Chicago & Northwestern R. v. Jackson, 55 Ill. 492.

Minnesota: Fay v. Minneapolis & St. Louis R., 30 Minn. 231.

Michigan: Roux v. Blodgett & Davis Lumber Co., 94 Mich. 607; *Vandeusen v. Letellier*, 78 Mich. 492.

New Jersey: Cole v. Warren Mfg. Co., 44 At. Rep. 647; *Hustis v. Banister Co.*, 6 Am. Neg. Cases 318; *Stone Co. v. Mooney*, 61 N. J. Law 253; *Curley v. Hoff*, 42 At. Rep. 731; *Steamship Co. v. Ingebregsten*, 57 N. J. 400.

New York: Cregan v. Marston, 126 N. Y. 568; *Fuller v. Jewett*, 80 N. Y. 46; *Corcoran v. Holbrook*, 59 N. Y. 517.

Missouri: Lewis v. St. Louis R., 59 Mo. 495.

Pennsylvania: Ralpho v. Moore, 68 Pa. 404; *Baker v. Allegheny Valley R.*, 95 Pa. 211.

Rhode Island: Mulvey v. R. I. Locomotive Works, 14 R. I. 204.

Texas: Houston & Texas R. v. Dunham, 49 Texas 181; *Houston & Texas Central R. v. Marcellus*, 59 Texas 334.

Virginia: Moon v. Richmond & A. R., 78 Va. 745; *Torian v. Richmond & Allegheny R.*, 84 Va. 192.

West Virginia: Cooper v. Pittsburg & St. Louis R., 24 W. Va. 37.

South Carolina: Gunter v. Graniterville Mfg. Co., 18 S. Car. 262.

Wisconsin: Sherman v. Menominee Lumber Co., 72 Wis. 122; *Bessex v. Railway Co.*, 45 Wis. 482; *Brabbitts v. Chicago & Northwestern R.*, 38 Wis. 289;

them continues at his employment without complaint, he stands in the same position as one who knowingly undertakes his employment in the beginning, and assumes the increased risk. (2) On the other hand, with respect to employees who know nothing of the greater danger, the employer is liable to them in the same degree as he would be if he equipped his mill or other plant with unfit appliances in the beginning. (3)

3. This principle does not apply to defects arising in the daily use of appliances, which do not require the aid of skilful mechanics to repairs. These, workmen usually repair themselves, and the law casts no liability on the employer for them. (4) Furthermore, when a master has a machinist, to whom his servants are required to report when repairs become needful, one of them cannot recover for an injury caused by making repairs himself. (5)

When an employer provides his servants with safe tools and machinery, he does not promise or engage that they will always remain in the same condition, and any defect which appears from their use the servant should report to his employer.

Again, an employer is not in fault if a tool or machine breaks, whether from an internal original fault not apparent when the tool or machine was at first provided, or for an external apparent one produced by time and use, which is not made known to the employer. (6)

A different rule, though, applies to perishable appliances. The employer knows that they will last only a limited time, and it is his duty to renew them at proper intervals. This principle applies especially to the use of ropes and similar things which are constantly wearing out from using them. (7)

4. An employer's duty to make inspections will next be considered.

Schultz v. Chicago & St. Paul R., 48 Wis. 375; Wedgewood v. Chicago & Northwestern R., 44 Wis. 44.

Fed.: Lund v. Hersey Lumber Co., 41 Fed. 202; Baltimore & Ohio R. v. Baugh, 149 U. S. 368; Hough v. Railway Co., 100 U. S. 213.

(2) Davidson v. Cornell, 132 N. Y. 234.

(3) Id.

(4) Daley v. Boston & Albany R., 147 Mass. 101; Miller v. Grand Trunk R., 90 Mich. 230; Texas & Pacific R. v. Patton, 61 Fed. 259; Gottlieb v. Railroad, 101 N. Y. 462; Benzing v. Steinway, 101 N. Y. 547; Cone v. Railroad, 81 N. Y. 208; Murray v. Usher, 117 N. Y. 543; Fuller v. Jewett, 80 N. Y. 46; Cregan v. Marston, 126 N. Y. 568 (see Corcoran v. Holbrook, 59 N. Y. 568); Brick v. Railroad, 98 N. Y. 211; Carlson v. Railroad, 21 Or. 450; Murphy v. Railroad, 88 N. Y. 146; Bryant v. Railroad, 66 Iowa 305; Howland v. Railroad, 54 Wis. 226.

(5) McCune v. National Starch Mfg. Co., 142 N. Y. 106; Crown v. Orr, 140 N. Y. 450; Cahill v. Hilton, 106 N. Y. 512.

(6) Baker v. Allegheny Valley R., 95 Pa. 211.

(7) Baker v. Allegheny Valley R., 95 Pa. 211; Rapho v. Moore, 68 Pa. 404; Indiana Car Co. v. Parker, 100 Ind. 193; City of Indianapolis v. Scott, 72 Ind. 196. See Smith v. New York Central R., 118 N. Y. 645.

These fall under three heads: (1) The inspection of materials, appliances and machinery that are to be used before they are given to workmen; the inspection of cars both (2) before and (3) while using them. The first inquiry belongs to another section, that relating to the furnishing or selection of materials; the latter inquiry, which relates to an employer's duty to keep his appliances and machinery in repair, belongs in this place. Rather than divide the inquiry the whole subject will be considered here. Let us, therefore, begin with the branch relating to the inspection of appliances or machines before putting them into use.

5. As an employer is required by the rule to furnish safe appliances, this also requires or implies his duty of inspecting them before they are put into use. In one of the cases in which this rule was applied to a chain purchased by a railroad company for use on a car, the court said: "It not only can, but its duty requires that it shall, before the chain is placed on a car, cause every link of it used by its employes in places or under circumstances involving danger, in case the chain should break, to be carefully tested and inspected by some one competent to judge of its fitness for the utmost strain that is likely to come upon it." (8)

6. This rule does not exist in New York. (9) The Court of Appeals has declared another to the effect that reliance may be put on the maker of an article. If it is bought of a reputable maker, that is a sufficient guaranty of its quality to dispense with any further test. The Pennsylvania rule is similar. "If a person employs others, not as servant, but as mechanics or contractors in an independent business, and they are of good character, if there was no want of due care in choosing them, he incurs no liability for injuries to others from their negligence or want of skill. If I employ a well known and reputable mechanic to construct a steam engine, and it blows up from bad materials and unskilful work, I am not responsible for any injury which may result, whether to my own servant or to a third person." (10)

7. The Illinois rule is nearly the same. "When employers have, so far as the employment of reasonable skill and experience enables them, employed experienced, skilful and prudent servants in the use of their machinery, have selected good and safe machinery, so far as known, and well-recognized tests can determine, constructed of proper material, free from defects, so far as like tests will disclose,

(8) *Morton v. Railroad*, 81 Mich. 433. The New York rule prevailed in Michigan at an earlier date. *Grand Rapids R. v. Huntley*, 38 Mich. 546; *Michigan Central R. v. Coleman*, 28 Mich. 440; *Grand Rapids R. v. Judson*, 34 Mich. 506; *Fort Wayne R. v. Gildersleeve*, 33 Mich. 133; *Michigan Central R. v. Dolan*, 32 Mich. 510.

(9) *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273.

(10) *Ardesco Oil Co. v. Gilson*, 63 Pa. 150.

neither reason nor justice requires that they should be held liable for injuries that may result." (11)

8. An employer's duty of inspection declared by the United States Supreme Court differs somewhat from this. "It is not necessarily the duty of a purchaser of machinery, whether simple or complicated, to tear it to pieces, to see if there be some latent defect. If he purchases from a manufacturer of recognized standing, he is justified in assuming that in the manufacture proper care was taken, and that proper tests were made of the different parts of the machinery, and that, as delivered to him, it is a fair and reasonable condition for use. We do not mean to say that it is never the duty of a purchaser to make tests or examinations of his own, or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested. It may be, and doubtless often is, his duty, when placing the machine in actual use, to subject it to ordinary tests for determining its strength and efficiency." (12)

9. Thus several rules are competing for general adoption—the Michigan rule, requiring employers carefully to test their appliances before giving them to their employes to use; the Illinois rule, requiring such tests to be made as are well recognized; the New York rule, that the purchase from reputable dealers or builders will suffice, and the federal rule that in some cases no tests are required of the employer; in others, that they are.

The federal rule is peculiar; it adopts both views; in other words, the employer can rely on the reputation of the purchaser in some cases; in others, he must test the quality and strength of the appliances or other things to be used by the employe, but sheds not the faintest glimmer of light on the question, "In what cases must tests be made?" The federal rule leaves all in the dark; each case must be settled by itself, whether a test ought to have been made, or whether the employer was justified in trusting to the reputation of the seller.

10. Do these rules apply to the inspection of hammers, saws, ladders, and small tools that are in constant use? We have seen that in the Phoenix Bridge case (13), the rule was applied to a hook for handling iron. Why should not the duty of inspection apply to one thing as well as another; though varying perhaps with respect to the use to be made of the thing itself? Thus, one can readily see that a long ladder ought to be more carefully inspected than a short one, and that a short ladder which is to be used in a very dangerous place ought to be more carefully inspected than one that is to be used in an ordinary manner. Or, again, a chain that

(11) *Illinois Central R. v. Phillips*, 49 Ill. 237.

(12) *Richmond & Danville R. v. Elliott*, 149 U. S. 266.

(13) 132 N. Y. 273.

is to be used on a car ought to be more carefully inspected than a farmer's chain that is ordinarily attached to a drag or harrow, which, if broken, is not likely to lead to any serious accident. Indeed, is it not quite evident that the character of an inspection ought to turn on the use to which the thing is likely to be put, as well as the thing itself? Some things, like a steam boiler, require careful inspection because it will surely be put to severe use; other things, like a chain or ladder may not be, and in the latter class of cases the kind or carefulness of the inspection should depend on the use.

"We cannot hold," says the Supreme Court of Georgia, "that an employer is liable to his servant when he furnishes him with an axe, a wagon, a saw, a hammer or any other tool which appears to be first class, and which subsequently, by some latent defect, breaks and injures the servant. If such were the law every farmer, contractor or other employer would be liable to his employe when he furnished him with tools and they broke and injured him on account of some latent defect which could not be ascertained by the exercise of ordinary care." (14)

In like manner, the Supreme Court of Pennsylvania has remarked: "To allow a servant to handle and use a chain for days, weeks or months, and then hold a master responsible for accidents resulting from wear and tear, or breaking, would be harsh law. That such articles will in time wear out or break is evident, but who is better able to judge of their condition than those who have them in their daily use? To hold otherwise would be to offer a premium for carelessness; for the servant by mere inattention to his duty might allow his tools to become unfit for use, and then visit the consequence upon his employers. A different rule prevails with reference to machinery or perishable articles, which experience teaches us require regular inspection, and which are ordinarily presumed to demand repairs or attention." (15)

11. From the duty of inspecting materials in general we will pass to the duty of inspecting railroad cars. This has given rise to a vast inquiry and hopeless division among the courts. The cars are classified into those owned by the inspecting road and those belonging to other lines. Let us first consider the duty of a company to inspect its own cars and afterward those belonging to other companies.

Its duty to inspect its own cars is by many courts regarded as a primary duty belonging directly to the company as much so

(14) *Ga. Railroad & Banking Co. v. Nemes*, 83 Ga. 70, 76.

(15) *Kinney v. Corbin*, 132 Pa. 341; *Marsh v. Chickering*, 101 N. Y. 396; *Corcoran v. Milwaukee Gas Light Co.*, 81 Wis. 191; *Cahill v. Hilton*, 106 N. Y. 512; *Dorsey v. Construction Co.*, 42 Wis. 596; *Stephenson v. Duncan*, 73 Wis. 406; *Gowen v. Harley*, 6 C. C. App. 190.

as the selection of competent servants and suitable appliances and machinery and, therefore, the inspector acts directly for the company as clearly as though the duty were performed by the president himself. Thus acting he is not a fellow-servant with the servants around him, but is a representative of the company, which consequently is liable for his negligence. (16)

A few utterances of the courts may be given: Speaking for the New York Court of Appeals, Chief Justice Andrews says: "The duty of a railroad company to use reasonable care to protect its employes from injury while engaged upon its trains embraces the obligation to use reasonable care in furnishing suitable machinery in the first instance, and to keep it in repair so that their lives may not be exposed to unnecessary peril. The duty of proper inspection for the purpose of discovering defects which may arise from use, is a part of the duty owing by the company to its servants. Where an employe is injured from defective machinery, the fact that he was so injured does not alone raise a presumption of

(16) That he is not a fellow-servant is the opinion held in the following states:

Colorado: *Colorado Central R. v. Ogden*, 3 Col. 499; *Denver Tramway Co. v. Crumbaugh*, 23 Col. 363.

Iowa: *Greenleaf v. Illinois Central R.*, 29 Iowa 14; *Braun v. Chicago R.*, 53 Iowa, 595.

Indiana: *Taylor v. Evansville R.*, 121 Ind. 124; *Cincinnati R. v. McMullen*, 117 Ind. 439; *Indiana R. v. Snyder*, 140 Ind. 647; *Mitchell v. Robinson*, 80 Ind. 281; *Ohio R. v. Stein*, 140 Ind. 61.

Illinois: *Chicago & Alton R. v. Hoyt*, 122 Ill. 369; *Chicago R. v. Johnson*, 55 Ill. 492; *Tudor Iron Works v. Weber*, 129 Ill. 535; *Chicago R. v. Kneirim*, 152 Ill. 458.

Kansas: *Atchison R. v. McKee*, 37 Kan. 592.

Minnesota: *Tierney v. Minneapolis & St. Louis R.*, 33 Minn. 311.

Michigan: *Mich. Central R. v. Anderson*, 107 Mich. 591; *Dewey v. Detroit R.*, 97 Mich. 329; *Balkoff v. Michigan Central R.*, 106 Mich. 606.

Missouri: *Porter v. Hanibal & St. Joseph R.*, 71 Mo. 66; *Corey v. Hanibal & St. Joseph R.*, 86 Mo. 635; *Bowen v. Chicago R.*, 95 Mo. 268; *Rodney v. St. Louis R.*, 127 Mo. 676; *Condon v. Mo. Pacific R.*, 78 Mo. 567.

New York: *Fuller v. Jewett*, 80 N. Y. 46; *Warner v. Erie R.*, 39 N. Y. 468; *Cone v. Delaware & Hudson R.*, 15 Hun 172.

North Carolina: *Johnson v. Richmond R.*, 81 N. C. 453.

Texas: *Houston R. v. Marcelles*, 59 Texas 334; *Mo. Pacific v. McElyea*, 71 Texas 386; *St. Louis R. v. Putnam*, 1 Texas Civ. App. 142.

West Virginia: *Cooper v. Railroad*, 24 W. Va. 38; *Johnson v. Chesapeake & Ohio R.*, 36 W. Va. 83.

Wisconsin: *Schultz v. Chicago R.*, 40 Wis. 589; *Brabbits v. Chicago R.*, 38 Wis. 298.

United States: *Texas R. v. Barrett*, 166 U. S. 617; *Northern Pacific R. v. Herbert*, 116 U. S. 642; *Hough v. Texas R.*, 100 U. S. 213; *U. S. Little Rock R. v. Moseley*, 56 Fed. 1009; *Railroad Co. v. McDade*, 135 U. S. 569; *Railroad Co. v. Hambly*, 154 U. S. 357; *Railway Co. v. Archbald*, 170 U. S. 665; *New Orleans R. v. Clements*, 40 U. S. Ct. of App. 465.

negligence on the part of the company." (17) And the Supreme Court of Wisconsin has said in another case against a railroad: "The company was under obligation to use reasonable means to guard against defects in its cars. It was bound to exercise reasonable diligence in watching its cars, inspecting them, and keeping them in repair. The duty it owed its employees. The danger they incurred in entering its service was not to be increased by neglect or failure to perform this legal duty. And if there was a defect in the braking apparatus of the car in question, which had existed so long or was of such a character that the company, by the exercise of ordinary care could have discovered and repaired it, it is liable for an injury sustained by an employee in consequence of such defect." (18)

This rule, however, does not prevail everywhere, and among the states holding a contrary view is Pennsylvania. The following is the reasoning of the court: "If the company employ competent and skilful persons for the purpose of inspection, and afford them reasonable opportunities and facilities for the work under proper instructions, the company will not ordinarily be liable for the negligent performance of the work by their employees, to a fellow-employee, unless the company knew, or by ordinary diligence ought to have known of the defective manner in which the inspection was conducted. We are clearly of opinion too that a brakeman and a car inspector are in the same circle of appointment; they co-operate in the same business, and the former knows that the employment of the latter is one of the incidents of their common service." (19)

12. Still greater differences have arisen concerning the rule that ought to be applied to the inspection of foreign cars. In the first place the distinction must be kept clearly in mind between foreign cars that are imperfect because they are not in good condition, and those which are in good condition but imperfect because they are faulty in construction for use on another road than its own. Thus,

States in which an inspector does not represent his employer and is a fellow-servant:

Arkansas: *St. Louis R. v. Rice*, 51 Ark. 467; *St. Louis R. v. Gaines*, 46 Ark. 555.

Alabama: *Nashville R. v. Foster*, 10 Lea (Tenn.) 351; *Mobile R. v. Thomas*, 42 Ala. 672.

Massachusetts: *Hopkins v. Eastern R.*, 119 Mass. 419; *Mackin v. Boston & Albany R.*, 135 Mass. 201.

Maryland: *Wonder v. Baltimore & Ohio R.*, 32 Md. 411; *Yates v. McCullough Iron Co.*, 69 Md. 370.

Ohio: *Railroad v. Webb*, 12 Ohio St. 475; *Railroad v. Fitzgerald*, 42 Ohio St. 318.

Tennessee: *Railroad v. Foster*, 10 Lea, 351.

(17) *Baily v. Rome & Watertown R.*, 139 N. Y. 302, 305.

(18) *Wedgwood v. Chicago & Northwestern R.*, 44 Wis. 44, 49.

(19) *Philadelphia & Reading R. v. Hughes*, 119 Pa. 301, 314.

some foreign cars may be perfectly adapted to its own road, but imperfect on another, by reason of different coupling appliances, or of greater height, whereby they can be coupled only with great difficulty or by using an unusual coupler.

13. A foreign car that is not in good condition need not be received by another road; to this rule all courts agree. (20)

14. If the car is in good condition the receiving road is bound by the same rule as applied to the inspection of its own cars. In the case of *Gottlieb v. New York R.*, Justice Earl said: "It is bound to inspect foreign cars just as it would inspect its own cars. It owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects or refuse to take such cars; so much, at least, is due from it to its employees. The employees can no more be said to assume the risk of such defects in foreign cars than in cars belonging to the company. As to such defects the duty of the company is the same as to all cars drawn over its road. The rule imposing this responsibility is not an onerous or inconvenient or impracticable one. It requires before a train starts and while it is upon its passage the same inspection and care as to all the cars in the train." (21)

Likewise the Supreme Court of Missouri declares that "while it is not incumbent upon the receiving company, on receipt of the car, to make tests to discover hidden defects in the construction or in the materials used in the construction, still it is bound to inspect foreign cars, just as it would and is required to inspect its own after they have been in use. The duty devolves upon the company as much in the one case as in the other." (22)

15. In Massachusetts and some other states a different rule is prescribed, that of inspection and nothing more. Thus, in *Mackin v. Boston & Albany R.* (23), the court declared that the obligation of drawing cars over its road would not extend to such as were in an unsafe condition; but, as to cars so received, the duty of the other road was to furnish proper instrumentalities for service, but of inspection, and this duty was performed by the employment of sufficient competent and suitable inspectors, who are to act under proper superintendence, rules and instructions. Whatever may be

(20) *Gottlieb v. New York Central R.*, 100 N. Y. 462, 469; *Mackin v. Boston & Albany R.*, 135 Mass. 201, 206.

(21) 100 N. Y. 462, 469; *Jetter v. Railroad*, 2 Abb. Ct. of App., Dec., 458; *Jones v. Railroad*, 92 N. Y. 628; *Miller v. New York Cent. R.*, 99 N. Y. 657; *Reynolds v. Railroad*, 64 Vt. 66; *Mason v. Railroad*, 111 N. C. 482; *O'Neil v. Railroad*, 9 Fed. 337.

(22) *Guttridge v. Railroad*, 94 Mo. 468.

(23) 135 Mass. 206.

the law as to other cars, the inspector must be deemed to be engaged in a common employment with the brakeman as to such cars, while in transit, and until they are ready to be inspected for a new service. By this rule, therefore, a foreign car that is defective need not be received, but if it is passed by the inspector and injury follows to some of the employes, a brakeman for example, there is no redress because they are in the same common service. (24)

Is not this conclusion a plain infraction of another rule, namely, that an employer must provide suitable appliances for his employes, and though he may delegate this duty of selecting them to another, yet he is responsible for his negligence and can in no wise escape from it? Surely it is, to that extent, an overthrow of this primary rule.

16. Let us pass now to the receiving of foreign cars that are imperfect simply because they are constructed in a different manner from those of the receiving company. These must be received; the law is imperative, and the risks from attempting to couple them and otherwise manage them while in the possession of the receiving company is one of the risks assumed by employes. Said the Supreme Court of the United States when applying the principle: "It is not pretended that these cars were out of repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods or bumpers of unusual length to protect the draw-bars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars, was apparent. It required no special skill or knowledge to detect it. The employe was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to any one. Under these circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer." (25)

17. Some remarkable consequences follow from this rule. In Massachusetts or Pennsylvania, for example, where an inspector is a fellow-servant with all others in the employ of the company, whether he is inspecting foreign or home cars, the rule is simple enough; and also in the State of Missouri, where he is not a fellow-servant, whether inspecting foreign or home cars.

(24) *Keith v. New Haven R.*, 140 Mass. 175; *Macken v. Boston & Albany R.*, 135 Mass. 201.

(25) *Kohn v. McNulta*, 147 U. S. 233, 241; *Baldwin v. Railroad*, 50 Iowa 680; *Indianapolis R. v. Flannigan*, 77 Ill. 365; *Thomas v. Missouri Pacific R.*, 109 Mo. 187; *Hulett's case*, 67 Mo. 239; *Railroad v. Black*, 88 Ill. 112; *Railroad v. Smithson*, 45 Mich. 212; *Gildersleeve v. Fort Wayne R.*, 33 Mich. 133; *Hathaway v. Railroad*, 51 Mich. 253; *Tuttle v. Railroad*, 122 U. S. 139; *Kelly v. Abbot*, 63 Wis. 307; *Ballou v. Chicago R.*, 54 Wis. 257; *Smith v. Potter*, 46 Mich. 258; *Whitman v. W. & M. R.*, 58 Wis. 408; *Simms v. Railroad*, 26 S. Car. 490.

But the federal rule leads to a ludicrous deduction: A train is composed of both home and foreign cars, as often happens. The inspector, while inspecting a home car is not a fellow-servant, but when inspecting the next, which is a foreign car, he is a fellow-servant. And now he inspects the coupling between two cars—one is a home car and the other a foreign one. It is defective, and the inspector is negligent in performing his duty and does not discover the defect. What relation does he hold to those around him; Is he a fellow-servant, or is he not? Such is the consequence of spinning a rule too fine for practical application.

18. The duty of a car inspector includes all, loaded and unloaded. His duty is just as imperative to inspect the load on a car with the view to its safe transportation as the car itself. Says the Supreme Court of Kansas: (26) "We are unable to see any reason for a distinction between the preparation and inspection of the car itself as a fit instrumentality to be placed in a train and the preparation and inspection of a loaded car to be placed in the train for transportation. Each is an instrumentality to be used in connection with the services necessary to be performed by the trainmen in its transportation, and no distinction between them is seen so far as the obligation of the company or the safety of the employes engaged in handling it are concerned. The inspection in either case is made with reference to the same end, and the person to whom this duty is delegated stands in the place of the company, and the latter is responsible for his acts."

19. We have stated that an employe must examine somewhat the machine or appliance he is to manage; or, as the courts have said, he cannot shut his eyes to the situation around him. He must exercise reasonable care and diligence in such examination and inspection. It will be seen that such work is that of inspection. Now, in cases in which an inspector is held to represent the employer and does nothing more, there can be no difficulty in fastening liability whenever it exists; but an inspector may act in a double capacity as an inspector, in which he represents his employer, and in another capacity, in which he does not. For example, does an engineer, when acting as an inspector of his engine, represent his employer, and if so, will a notice to him of a defect therein given, say by a fireman, have the same effect as a notice to the principal? Again, a brakeman is often required to inspect his brakes; is he, when performing this duty, acting for his principal and doing his work? In one of the cases that has happened in Texas a fireman was injured by the separating of the engine from the tender. It was the duty of the engineer to inspect the engine and make sure that the coupling was safe. Through his

failure to perform this duty, the fireman was injured and the company was held negligent, because his negligence to do his duty as an inspector was regarded as the negligence of the company. The same view is held by the courts in West Virginia. (27)

20. The risk of accident from the previous negligence of servants employed in the same way is one of the ordinary risks of employment. An employe, therefore, is not required to inspect the work of those employed to ascertain whether it is properly done or not by others engaged in the same service. (28)

21. "In respect to the manufacture of implements for the use of his employes, the employer is not bound to insure them as absolutely safe and sound, but is held only to the employment of every precaution against danger which a reasonably prudent man would do under the same circumstances. Where the danger is great, as in the case of railroads, the law requires a very high degree of care on the part of the employer. But where an employer, who is also the manufacturer of the implement used by his employes, has selected his materials with proper care, and employed competent, careful and skilful machinists in their manufacture, he has discharged his duty to his employes, unless he had, or by the exercise of reasonable care might have had, knowledge of existing defects therein." (29)

Section 5.

An Employer Must Provide Safe Places.

1. An employer must provide a suitable place for his employes while at work. A safe place has a varied meaning. In one of the cases a man was employed to clean out an underground pipe, and for this purpose a trench was opened for him. While engaged there the earth caved in and he was killed. A recovery was sought on the ground that his employer had not provided a safe place for him to do his work. The court held that this was the master's duty, and whether he had performed it was a question of fact for the jury to decide. (30) Said Justice Finch: "The defendant owed to his servant the duty of providing a place reasonably safe for the work which he was directed to do. Those who opened the trench were

(27) *Riley v. W. Va. Central R.*, 27 W. Va. 145.

(28) *O'Connor v. Rich*, 164 Mass 560.

(29) *Chicago & Alton R. v. Mahoney*, 4 Ill. App. 262, 266; *Chicago R. v. Troesch*, 68 Ill. 545; *Chicago & Alton R. v. Shannon*, 43 Ill. 338; *Richardson v. Cooper*, 88 Ill. 273.

(30) *Kranz v. Long Island R.*, 123 N. Y. 1, 4; see *Stuber v. McEntree*, 143 N. Y. 200.

performing the master's duty to the deceased in preparing a suitable place and opportunity for the labor of the intestate in discharge of his duty."

Evidently the nature of the place will vary greatly with the work to be done. A safe mill means a very different thing from a safe coal mine or railroad. (31)

The same rule applies to a railroad company as to any other employer, but the application of it is perhaps more difficult than in other cases, because a railroad is such a complicated thing. In the case of *Baltimore & Ohio R. v. Stricker* (32), the Supreme Court of Maryland remarked that it was the duty of the company to exercise all reasonable care to provide and maintain safe, sound and suitable machinery, roadways, structures and instrumentalities; and it could not expose its employes to risks beyond those which are incident to the employment, and were in contemplation at the time of the contract of service. Furthermore, the employe has a right to presume that the company has discharged these duties. (33)

2. In applying this rule to a company that has built overhead bridges so low that those who are engaged on top of the cars, brakemen especially, must stoop when passing them, to prevent accident, several minor rules have been wrought out that will be stated.

One rule is that a company is not required to build such bridges high enough for a man to stand upright on top of a car. "Such structures," says Chief Justice Beasley, of the Supreme Court of New Jersey, "would often be inconvenient, and sometimes perhaps impracticable." The company, therefore, in that case owed no duty to the injured man "not to subject him to the danger into which he fell." (34)

On the contrary, an overhead bridge not high enough for an employe to stand upright on top of a car is by many courts regarded as improperly built. Says the Supreme Court of Indiana: "It seems to us that a railroad company is, and ought to be, required to construct and maintain its roadway and appendages, and its overhead structures in such manner and condition that its employes or servant can do and perform all the labors and duties required of him

(31) *King v. Boston & Worcester R.*, 9 Cush. 112; *Snow v. Housatonic R.*, 8 Allen 441; *Gilman v. Eastern R.*, 10 Allen 236 and 13 Allen 433; *Cayzer v. Taylor*, 10 Gray 274; *Seaver v. Boston & Maine R.*, 14 Gray 466; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 583; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Fifield v. Northern R.*, 42 N. Hamp. 225.

(32) 51 Md. 47, 69.

(33) *Chicago R. v. Swett*, 45 Ill. 197; *Illinois Central R. v. Welch*, 52 Ill. 183; *Chicago R. v. Russell*, 91 Ill. 298; *Hough v. Railway*, 100 U. S. 213; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Wonder v. Baltimore & Ohio R.*, 32 Md. 411; *O'Connell v. Baltimore & Ohio R.*, 20 Md. 212.

(34) *Baylor v. Railroad*, 40 N. J. Law 23.

with reasonable safety." Such a bridge is regarded as defective and dangerous by many courts. (35)

Although a bridge may be unsuitable or defective in character, yet an employe cannot recover for an injury caused by it when he knew of its existence, or was properly warned of its location and of the danger, for then he assumes the risk; but when he is not informed or does not know of its existence, then he can recover. The rule has been well stated by Justice Trunkey. "Where a railroad company negligently places an obstruction over its roadway, dangerous to the lives of its employes, it fails in its duty to them and, therefore, if a person enters the service of the company in ignorance of such danger, and remains ignorant thereof until injured or killed by it, the company is liable for damages. But if the employe had knowledge of the nature and degree of the peril when he entered the service, or continued in the service after such knowledge without protest and promise of amendment, the case is different." (36)

3. The same rules applies generally in placing tanks, cattle chutes and other structures so near the track as to endanger the lives of employes. It is negligence to build or keep them there. Yet those who know of their existence, or have fair warning of their danger and remain in the service, have no cause for complaint if injured.

The Supreme Court of Wisconsin, while adopting the doctrine, reinforces it with another argument: (37) "If a uniform custom of railroad companies to use structures unnecessarily dangerous to persons employed in operating trains had been proved, we should hesitate gravely before holding that the custom should excuse the

(35) *Baltimore & Ohio R. v. Rowan*, 104 Ind. 88; *St. Louis R. v. Irwin*, 37 Kan. 701; *Chicago & Alton R.*, 116 Ill. 206; *Louisville R. v. Wright*, 115 Ind. 378; *Chicago R. v. Carpenter*, 8 C. C. of App., 56 Fed. 451; *Chicago R. v. Johnson*, 4 N. E. Rep. 381 (Ill.).

(36) Cases in which he knew and could not recover:

Baltimore & Ohio R. v. Stricker, 51 Md. 47; *Clark v. Richmond & Danville R.*, 78 Va. 709; *Owen v. New York Central R.*, 1 Lans. 108; *Sherman v. Rochester & Syracuse R.*, 17 N. M. 153; *Faulkner v. Erie R.*, 49 Barb. 324; *Warner v. Erie Erie Railway Co.*, 39 N. Y. 468; *Devitt v. Pacific R.*, 50 N. Y. 302; *Pittsburg R. v. Sentmeyer*, 92 Pa. 276; *Brossman v. Lehigh Valley R.*, 113 Pa. 490; *Lynch v. New York R.*, 63 Hun 635; *Wallace v. Central Vt. R.*, 63 Hun, 632; *Chicago v. Alton R.*, *Matthews*, 39 Ill. App. 541; *Altmann v. Gabriel*, 28 Minn. 132; *Gibson v. Erie Railway Co.*, 63 N. Y. 449; *Clark v. St. Paul R.*, 28 Minn. 128.

Cases in which the employe did not know and recovered:

Illinois Cent. R. v. Welch, 52 Ill. 183; *Chicago R. v. Russell*, 91 Ill. 298; *Flanders v. Chicago R.*, 51 Minn. 193; *Georgia Pacific R. v. Davis*, 92 Ala. 300; *Pidcock v. Union Pacific R.*, 19 Pacific Rep. (Utah) 191; *Bois v. Northern Pacific R.*, 5 Dak. 308; *Kearns v. Chicago R.*, 66 Iowa 599; *Allen v. Burlington R.*, 57 Iowa 623; see *Gould v. Chicago R.*, 66 Iowa 590, and *Davis v. Columbia R.*, 21 S. Car. 93; *Williamson v. Newport News R.*, 34 Vt. 657.

(37) 42 Wis. 583, 597,

danger. The operation of railroad trains is essentially highly dangerous, and it is a duty of railroad companies, too plain for discussion, to use all reasonable skill to mitigate, tolerating nothing to aggravate the necessary danger." (38)

4. When a scaffold is regarded as a place, the same rule applies to it as to any other place for working—it must be necessarily safe. (39)

When it is regarded as an appliance, (40) then it may be considered in a double aspect. Under one aspect the master is bound by the same rule that applies to every other appliance, it must be reasonably safe; and this rule applies to him whether it is completed or not. Consequently, if an accident occurs while building it in which the master is negligent, or any of his employes, he is responsible.

Under the other aspect he is bound only for the materials entering into its composition—these must be reasonably safe. In using these, however, the men are regarded as fellow-employes, the same as when doing any other kind of work, and their master is not liable for their negligence, unless he was negligent in the beginning in selecting them.

The question whether a scaffold or apparatus that is to be built must be regarded as an appliance which an employer is required to furnish his servants under the general rule requiring him to furnish safe and suitable appliances for their work, or whether it is to be regarded simply as a piece of work to be done for which the employer is responsible only for the furnishing of suitable material and competent men for putting them together, received an elaborate discussion in *Peschel v. Chicago & St. Paul R.* (41) The apparatus in this case was to be used for setting up a water tank and wind-mill, and the different parts were suitable for the purpose, but in erecting them a workman was injured. The majority of the court declared that "the work of the servants in adjusting the detached machinery for use was a common employment which they were hired to do, and for which they were paid. I see no escape from this reasoning which appears logical and sound."

Justice Ingraham, speaking for the Supreme Court of New York, (42) after an elaborate review of the cases decided by the highest court in that state thus formulates the rule: "Where an employer employs mechanics to do a certain amount of work, the

(38) *McKamara v. MacDonough*, 102 Cal. 575; *Conner v. Construction Co.* 27 Fed. 629. See *Noyes v. Wood*, 102 Cal. 389; *Haworth v. Seever Mfg. Co.*, 87 Iowa 165.

(39) *McCone v. Gallagher*, 44 N. Y. Supp. 697.

(40) *Butler v. Townsend*, 126 N. Y. 105.

(41) 62 Wis. 338.

(42) *McCone v. Gallagher*, 44 N. Y. Supp. 697.

doing of which requires the use of scaffolds, which it is a part of the work of the mechanics so employed to construct, and the employer furnishes proper materials with which to construct the scaffolds, the negligent use of such materials, either by improperly uniting them together, or by selecting materials not proper for the particular use for which they are selected, whereby one of such mechanics is injured, as the accident was not the result of the neglect of duty that the master owed to his employes, the master is not liable; and that, to establish a cause of action for such an injury, the plaintiff must prove, in addition to the fact that there was negligence in the selection of the materials for the building of the scaffold, the additional fact that the master, or some one that stood in the relation of representative of the master, assumed to construct the scaffold, and then directed the employes to use it as a constructed scaffold."

In the case of a defective staging used for building a bridge, the Supreme Court of Missouri remarked that "a servant is not a mere machine, employed to drive a nail here or a spike there, where directed by the master or some one representing him. Many things involving the exercise of judgment may properly be left to the servants. Hence, it has been held, where the master employs competent workmen, and provides suitable material for staging and entrusts the duty of erecting it to the workmen as a part of the work which they are engaged to perform, that he is not liable to one of the workmen for injuries resulting to one of them from the falling of the staging. The negligence in such cases resolves itself into negligence of a fellow-servant, and the principle has been applied under a variety of circumstances.(43) It is just as well settled that if the master undertakes to furnish structures to be used by the servant in the performance of his work, the master must use due care in the erection of the structures, and, if there is negligence on his part, or negligence on the part of some one representing him in that respect, he is liable for injuries sustained by the servant." (44)

The Supreme Court of Minnesota, however, has made the following ruling under which there is not likely to arise many question concerning scaffolds: When the general work in which servants are engaged includes the construction or preparation of appliances, with which they are to do their work, for example the making of a scaffold, they are to be deemed fellow-servants as much while making this as in erecting the building for which the appliance was made. In other words, the construction of the scaffold and

(43) *Kelley v. Norcross*, 121 Mass. 508; *Kellea v. Faxon*, 125 Mass. 485; *Armour v. Hahn*, 111 U. S. 313; *Peschel v. Railroad*, 62 Wis. 338.)

(44) *Black, J., Bowen v. Chicago & Kansas City R.*, 95 Mo. 268, 277; *Arkerson v. Dennison*, 117 Mass. 407,

the building are to be regarded as one enterprise or undertaking in which all are employed as fellow-servants. (45)

5. If an employer engages a competent scaffold builder to erect one, which proves defective, the latter is regarded as an independent contractor, and it may be accepted without inspection. (46)

6. A large number of questions has arisen on this subject. Suppose a scaffold is erected for one purpose, for example, in putting up a cornice, and is subsequently used for another, painters to paint the cornice, and it should give way while a painter was at work, what then? In a case of this nature the master was held not liable. (47)

7. Furthermore, in supplying material it is not the employer's duty to supervise the selection of every stick that is used. It is said that he fulfills his duty when he furnishes an abundance of material from which his servants can select what is needed. (48)

8. It is the duty of an employer to use all reasonable care to protect his servant from extra hazard. He should not direct him to work in a place which he knows, or might with reasonable care and diligence have ascertained to be dangerous. (49)

9. There is one important limitation to this rule touching an employer's duty to provide a reasonably safe place for his servants to pursue their employment. It is the rule that applies to those servants who, from the nature of their occupation, are constantly changing their places. It may be stated in the language of one of the most recent cases: "While it is the duty of the master to exercise ordinary care to furnish the servants a safe place in which to work, there is an exception to that rule as well established as the rule itself, namely, that where the work which the servant is employed to perform is such work as necessarily involves the constant change of the place where the work the servant undertakes to do, then the servant assumes the risk necessarily and ordinarily incident to such changes." (50)

(45) *Marsh v. Herman*, 47 Minn. 537; *Lindvall v. Woods*, 41 Minn. 212; *Fraser v. Red River Lumber Co.*, 45 Minn. 235.

(46) *Devlin v. Smith*, 89 N. Y., 470; *Butler v. Townsend*, 126 N. Y. 105.

(47) *Hoar v. Merritt*, 62 Mich. 386.

(48) *Ross v. Walker*, 139 Pa. 42. For other cases relating to the use of materials, see *Dewey v. Parke-Davis Co.*, 76 Mich. 631; *Haworth v. Seevers Mfg. Co.*, 87 Iowa 765; *Brown v. Gilchrist*, 80 Mich. 56; *Brothers v. Cartter*, 82 Mo. 372; *Beeson v. Green Mt. Mining Co.*, 57 Cal. 20.

(49) *Consolidated Ice Machine Co. v. Kieffer*, 26 Ill. App. 466.

(50) *Rogers, J., Browe v. King*, 40 U. S. Ct. of App. 545, 549; *Railway Co. v. Jackson*, 12 U. S. Ct. of App. 48; *City of Minneapolis v. Lundin*, 7 U. S. Ct. of App. 525.

Section 6.

Assistance.

1. The employer must supply his servant with adequate help, not only in quality but in quantity. Whether he has done so is a question of fact. This question arose in *Flike v. Boston & Albany R.*, (51) relating to servants employed in conducting a train. Chief Justice Church said: "It was clearly the duty of the corporation in making up and dispatching the advance train, to supply it with suitable machinery and sufficient help for the business and journey which it was about to undertake; and if there was any want of cars in these respects, which caused the injury, it is liable." (52)

The same principle has been asserted in other cases, though the existence of such a rule has been positively denied in Illinois.

Section 7.

Instructions.

1. Let us now inquire into the duty of employers to inform their servants concerning their employment, the appliances they are to use and the dangers to which they are exposed. The most general rule of all is that he is to make proper rules and give them due publicity. (53) A railroad corporation, for example, is required to

(51) 53 N. Y. 550.

(52) *Mad River R. v. aBrber*, 5 Ohio 541; *Booth v. Boston & Albany R.*, 73 N. Y., 38; *Philadelphia & Reading R. v. Hughes*, 119 Pa. 301, 314, 315.

(53) *Illinois: Illinois Central R. v. Whittemore*, 43 Ill. 420; *Chicago R. v. McLallen*, 84 Ill. 109; *Chicago & Northwestern R. v. Moranda*, 83 Ill. 302.

Indiana: Ohio & Miss. R. v. Collarn, 73 Ind. 261.

Iowa: Cooper v. Railroad, 44 Iowa 134; *Hoffbauer v. Railroad*, 52 Iowa 342.

Kansas: Hanibal & St. Joseph R. v. Kanaley, 39 Kan. 1.

Kentucky: Alexander v. Railroad, 83 Ky. 598.

Maryland: Cumberland & Pittsburg R. v. State, 44 Md. 283.

Massachusetts: Ford v. Fitchburg R., 110 Mass. 240; *Old Colony R. v. Tripp*, 147 Mass. 35.

New Jersey: Smith v. Oxford Iron Co., 42 N. J. Law 467.

New York: Berrigan v. New York Railroad, 131 N. Y. 582; *Abel v. Delaware & Hudson R.*, 103 N. Y. 581; *Slater v. Jewett*, 85 N. Y. 62; *Besel v. New York R.*, 70 N. Y. 171; *Sheehan v. New York Central R.*, 91 N. Y. 339; *Dana v. New York Central R.*, 92 N. Y. 639; *Corcoran v. Delaware & Hudson R.*, 126 N. Y., 673; *Morgan v. Hudson River Ore & Iron Co.*, 133 N. Y. 666; *Ford v. Lake Shore R.*, 124 N. Y. 493.

Ohio: Wolsey v. Railroad, 33 Ohio At. 227; *Pittsburg R. v. Henderson*, 37 Ohio St. 549; *Lake Shore R. v. Lavalley*, 36 Ohio St. 221.

Pennsylvania: Patterson v. Railroad, 76 Pa. 389; *Lewis v. Seifert*, 116 Pa. 628.

Texas: Pilkinton v. Railroad, 70 Texas 226.

Wisconsin: Luebke v. Railroad, 63 Wisconsin 91.

United States: Hough v. Railway Co., 100 U. S. 213.

use ordinary care and to anticipate and guard against such accidents and casualties as may reasonably be foreseen by its managers when exercising ordinary care.

In *Berrigan v. New York R.*, the court remarked: "The defendant was only bound to use ordinary care in formulating risks, and it is not reasonable to proceed upon the assumption that every injury to an employe can be guarded against and prevented by making such rules. It was the duty of the defendant to anticipate and guard against by rules and otherwise only such accidents and casualties as might reasonably be foreseen by the managers of the corporation exercising ordinary care and prudence." (54)

2. The application of this rule involves the following questions: In what cases are any rules or regulations whatever required for the safety of employes; in what cases were the rules proper or suitable.

3. Not every business requires the making and formulating of rules, but when the business relates to the conducting of railroads, factories, mines and other pursuits where large numbers are employed and the dangers are considerable, the duty clearly exists to make and promulgate such rules as will give reasonable protection from injury to the employes. Thus, in *Morgan v. Hudson River Ore & Iron Co.*, (55) the court said: "The failure to adopt rules is not proof of negligence, unless it appears from the nature of the business in which the servant is engaged that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity of such precautions." (56)

(54) 131 N. Y. 582.

(55) 133 N. Y. 666.

(56) Alabama: *Georgia Pacific R. v. Davis*, 92 Ala. 300.

Georgia: *Central Railroad & Banking Co. v. Kitchens*, 83 Ga. 83; *Rome Co. v. Dempsey*, 86 Ga. 499; *Sloan v. Georgia Pacific R.*, 86 Ga. 15; *Georgia R. v. Rhodes*, 56 Ga. 645.

Illinois: *Abend v. Terre Haute R.*, 111 Ill. 202; *Quick v. Indianapolis R.*, 130 Ill. 334.

Iowa: *Connors v. Burlington R.*, 74 Iowa 383; *Deeds v. Chicago R.*, 74 Iowa 154; *Youll v. Railroad*, 66 Iowa 346.

Maine: *Shauny v. Androscoggin Mills*, 66 Me. 429.

Maryland: *Gordy v. New York R.*, 75 Md. 297.

Michigan: *Gardner v. Railroad*, 58 Mich. 584; *Karrer v. Detroit R.*, 76 Mich. 400; *Lyon v. Railroad*, 31 Mich. 429.

Mississippi: *Memphis R. v. Thomas*, 51 Miss. 537.

Missouri: *Francis v. Railroad*, 110 Mo. 387; *Schaub v. Hannibal R.*, 106 Mo. 74.

New York: *Guenther v. Lockhart*, 61 Hun 624.

Ohio: *Wolsey v. Railroad*, 33 Ohio 227.

Tennessee: *Louisville R. v. Wilson*, 88 Tenn. 316; *East Tenn. R. v. Smith*, 89 Tenn. 114.

Texas: *Gulf R. v. Ryan*, 69 Texas 665; *Pilkinton v. Gulf R.*, 70 Texas 226; *San Antonio R. v. Wallace*, 76 Texas 636.

In a recent case against a saw mill company an injured employee contended that the company was negligent in not having special rules for conducting the business. The court thought otherwise, declaring that "the business was not complex. There was no evidence that it was customary in saw mills to direct employes by special rules, and it could not be so held as a matter of law or submitted to the jury to decide without evidence. In complex employments, like railroads, rules have been held to be necessary. To require them in the simpler employments would only embarrass them without useful effect." (57)

4. Employes in many cases well know that regulations exist, and when they do it is their duty to read them. This is especially true of railroads. Indeed, this is so well understood that the courts take judicial notice of the practice. As this is the rule the fault in law is, therefore, the employee's if he does not know the regulations that are made for his guidance. (58)

5. To permit an employe to disregard a rule is in effect the same thing as to use defective machinery. Says the New York Court of Appeals: "No distinction exists in principle between permitting the use of defective machinery and permitting employes to habitually disregard the safeguards that have been provided to insure the safe running and operation of trains." (59)

6. If an employe has disobeyed a particular order or rule, he should be discharged, and not to do so is negligence. Thus, a company was notified that its engineers gave the control of its engines to firemen in direct violation of its orders. Clearly the company should have discharged them after receiving such a notice. (60) There have been many cases, however, of such frequent disregard of the rules that the master is considered as having acquiesced in their violation. In such cases, therefore, the existence of the rules has not prevented a recovery. (61)

Virginia: *Norfolk R. v. Briggs*, 14 S. E. 753; *Darracott v. H.* 83 Va. 288; *Williams v. R.*, 15 S. E. 522.

Federal: *Robertson v. Comelson*, 34 Fed. 716; *New Jersey R. v. Young*, 1 U. S. Ct. of App. 96; *Russell v. Railroad*, 47 Fed. 204.

(57) *Olson v. North Pacific Lumber Co.*, 40 U. S. Ct. of App. 429. In what cases are rules required: *Shepherd v. Northern Central R.*, 63 Hun 634; *Byrnes v. New York R.*, 71 Hun 209; *Texas & Pacific R. v. Cumpston*, Texas Civ. App. 23 S. W. 47.

(58) *Slater v. Jewett*, 85 N. Y. 68; *Pilkinton v. Railroad*, 70 Tex. 226; *Alexander v. Railroad*, 83 Ky. 598.

(59) *Coppins v. Railroad*, 122 N. Y. 563; also references in note 61.

(60) *Ohio & Miss. R. V. Collarn*, 73 Ind. 261.

(61) *Hissong v. Richmond R.*, 91 Ala. 514. See *Richmond R. v. Jones*, 92 Ala. 218.

Kansas: *Kansas City R. v. Kier*, 41 Kan. 661.

Kentucky: *Alexander v. Railroad*, 83 Ky. 590.

7. Of course, the notice must be given to the employer or one who properly represents him. (62)

8. There are many special rules that are made for unusual occasions and the above rule can hardly be applied to these. The most noteworthy are the special rules constantly made for the running of trains. What is the duty of the employer in respect to these? The court started out boldly with the rule, as we have seen, that employers must select suitable employes, appliances, places for working and also make proper regulations. And this was a positive primary requirement. If an employer, however, does not attend to this primary duty himself, but entrusts its performance to another, is he to be held strictly as though he had done it himself? He cannot shield himself by saying that he has appointed another whom he supposed was competent to do it for him, and who has proved unfaithful.

9. This rule, holding the employer to the same degree of liability when acting through another in performing the primary duty as though he were acting himself, has in some states been modified. (63) If an employer selects an agent who is supposed to be competent, his duty is done. He may fail, the rule or order may never be received, an employe may be injured in consequence, but this is one of the risks he assumes when entering his master's service. This was applied in a case relating to an order for the running of a train that was not properly sent forward. "It is not true," says Chief Justice Folger, "that on an occasion like this, it is the duty of the master, or a part of his contract to see to it, as with a personal might and touch, that notice of a temporary and special interference with a general time table comes to the intelligent apprehension of all those whom it is to govern in the running of approaching trains. It is utterly impracticable so to do, and a brakeman or a fireman on a train knows that it is, as well as any person connected with the business. He knows that trains will often and unexpectedly require to be stopped and started by telegraphic orders from distant points, and that such orders must, from the nature of the case, be given through servants skilled in receiving and transmitting them. If there is due care and diligence in choosing competent persons for that duty, a negligence by them in the performance of it is a risk of the employment that the co-

Massachusetts: *Hannah v. Railroad*, 154 Mass. 529.

Minnesota: *Fay v. Railroad*, 30 Minn. 234.

Missouri: *Barry v. Hannibal & St. Joseph R.*, 98 Mo. 62.

New York: *Sprong v. Railroad*, 58 N. Y. 56; *Hayes v. Bush Manufg. Co.*, 41 Hun 407; *Whittaker v. Delaware Co.*, 126 N. Y. 544.

Iowa: *Reed v. Railroad*, 72 Iowa 166.

Federal: *Northern Pacific R. v. Nickels*, 4 U. S. App. 369.

(62) *Michigan Central R. v. Dolan*, 32 Mich. 510.

employe takes when he enters the service." (63) This duty will be more fully considered in the next section of this chapter.

10. An employe cannot ordinarily dispute the reasonableness of a rule or regulation. But he is not required to comply with a rule at the peril of his life, not to perform an act which he knows is unlawful. (64)

11. One class of cases remain for notice, namely, instructions to minors or inexperienced persons. The law seeks to impose a graver duty on employers in making regulations and informing them of dangers, because of their inexperience. We have seen that it is the duty of an employer to make known any defects concerning appliances, places of working, that are not likely to be seen by a workman of ordinary observation. And if he fails to do this he is liable. In other words, it is the employer's duty to put his employe on the same plane with himself in respect to his knowledge of an appliance that he is to use.

12. Minors are presumed to know less than adults, and, therefore the duty of employers to furnish more rules and instructions is greater than in other cases. The duty varies with a child's age and capacity. Says Justice Hunt: "The conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." (65)

A very good statement of the rule is in *Tagg v. McGeorge*. (66) "When young persons without experience are employed to work with dangerous machines, it is the duty of the employer to give suitable instructions as to the manner of using them, and warning as to the hazard of carelessness in their use. If the employer neglect this duty, or if he give improper instructions he is responsible for the injury resulting from his neglect of duty. He is not answerable for injury to adults, nor for the injuries to young persons who have had that experience from which knowledge of danger may reasonably be presumed, and that discretion which prompts to care."

Another good exposition of the law is by the Supreme Court of Ohio: "Persons who employ children to work with or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion and care as is usual among children of the same age, under similar circumstances, and are bound to use due care, having regard to their age and inexperience, to protect them from the dangers incident to the situ-

(63) *Slater v. Jewett*, 85 N. Y. 61, 72.

(64) *Hawley v. Chicago R.*, 71 Iowa 717; *Stephens v. Railroad*, 86 Mo. 221. See *Norfolk & Western R. v. Williams*, 89 Va. 165.

(65) *Railroad Co. v. Stout*, 17 Wall. 657.

(66) 155 Pa. 368.

ation in which they are placed; and as a reasonable precaution, in the exercise of such care in that behalf, it is the duty of the employer, to so instruct such employes, concerning the dangers connected with their employment which, from their youth and inexperience they may not appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom." (66)

13. When, however, a child knows of the danger, then his employer is not required to instruct him. (67)

14. So, too, often a minor has been instructed or warned of a particular danger, and undertakes the employment, he assumes the risk like any other employe. (68)

15. Again, if a person assumes a risk on the promise of his master that he shall thereafter be instructed in his employment, and is injured through his master's neglect to give such instruction, the employe can recover from his employer. (69)

16. The fact that an injured employe is a minor does not affect his legal rights. A minor who goes into service with the consent of his father, is lawfully employed. He has the same rights that any other employe has and no more; and an employer is under the same liability to him as he is to other workmen. (70)

17. An employer must instruct his employe concerning the danger arising from extraneous causes. Says the Supreme Court of California: "There is no doubt that if the employer have knowledge or information showing that the particular employment is, from extraneous causes, known to him to be hazardous or dangerous to a degree beyond that which it fairly imports or is understood by the employe to be, he is bound to inform the latter of the fact. This elementary principle is usually applied to cases in which the employe has sustained injury by reason of some defect or unsoundness in the machinery or materials, unknown to him, about which he

(66) *Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283, 293; *Truntle v. North Star Woolen Mills Co.*, 57 Minn. 52; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548, 558.

(67) *Davis v. St. Louis R.*, 53 Ark. 117. See *Little Rock & Miss. River R. v. Leverett*, 48 Ark. 331; *Fones v. Phillips*, 39 Ark. 17; *Bauer v. R.*, 46 Ark. 388; *Rummell v. Dilworth*, 111 Pa. 343; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Gilbert v. Guild*, 144 Mass. 601; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182; *Probert v. Phipps*, 149 Mass. 258; *Coullard v. Tecumseh Mills*, 151 Mass. 85; *Crowley v. Pacific Mills*, 148 Mass. 228.

(68) *Devitt v. Pacific R.*, 50 Mo. 302. See *Rains v. St. Louis R.*, 70 Mo. 164.

Cases in which he was not sufficiently instructed:

Rummell v. Dilworth, 111 Pa. 343. See *Phila. & Reading R. v. Hughes*, 119 Pa. 301; *Railroad Co. v. Fort*, 17 Wall. 553.

(69) *McCormick Harvesting Machine Co. v. Burandt*, 136 Ill. 170; *Swaboda v. Ward*, 40 Mich. 420.

(70) *King v. Boston & Worcester R.*, 9 Cush. 112.

is employed to perform labor, and of which the employer knew, or might have known by the exercise of diligence on his part." (71)

Another application of this principle was made in the case of a servant who was injured by the overturning of hot slag in water, causing an explosion. The question was whether he should have been informed of the consequences of putting hot slag in water. The court said that he "must be assumed to have knowledge of natural laws, and of the knowledge of dangerous forces that come to every man of sound mind; and, therefore, the servant could not have received simply for an injury caused by spilling the slag upon himself. But the explosive power of hot slag when cast into water is not within the intelligence of ordinary men. It is doubtful whether many people of education know the force and violence of such an explosion. It is not so much a question whether the injured party has knowledge of all the facts of his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known, if he cannot make the deduction that peril arises from the relation of the facts. The peril may be a fact, in itself, of which he should be informed." (72)

18. An employer should not expose an inexperienced servant to a dangerous service without giving him warning. He must give him such instruction as will enable him to avoid injury, unless both danger and the means of avoiding it while he is performing the service require are apparent. Nor can he exempt himself from liability by delegating his power to command the servant to another on whom the obligation to instruct and caution is imposed. Says Justice Mitchell: "One of the well recognized duties of a master is not to expose an inexperienced servant, at whose hands he require a dangerous service, to such danger without giving him warning. He must also give him such instruction as will enable him to avoid injury unless both the danger and the means of avoiding it while he is performing the service required are apparent. These are the obligations of the master, and he cannot exempt himself from liability by delegating his power to command the servant to another upon whom the obligation to instruct and caution is also imposed.

"If the agent or servant upon whom the power to command is given exercises the power, and fails to discharge the obligation to the hurt of the servant who is without fault, the failure is that of the master and he must respond. The master having subjected

(71) *Baxter v. Roberts*, 44 Cal. 188.

(72) *Vedder v. Fellows*, 20 N. Y. 126; *McGowan v. La Plata Mining & Smelting Co.*, 9 Fed. 861; *Smith v. Peninsular Car Works*, 60 Mich. 501; *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676; *O'Connor v. Adams*, 120 Mass. 430; *Dowling v. Allen*, 74 Mo. 13; *Perry v. Marsh*, 25 Ala. 659; *Spelman v. Fisher Iron Co.*, 56 Barb. 151; *Parkhurst v. Johnson*, 50 Mich. 70.

the servant to the command of another without information or caution with respect to all such obligations as the master owes, the other stands in the masters place, and this is so notwithstanding the two servants are, as regards the common employment, fellow-servants." (73)

19. Besides, a service not dangerous in the beginning may become so, or the danger may be increased while serving. "As it is the duty of the master to inform his servant of increased danger and hazard created by him in the change of machinery or premises, unless the servant has notice, or the change or increased danger are so apparent that he ought to take notice, so when there are dangers and hazards known to the master, or of which he ought to have knowledge by the use of ordinary care, and which are not ordinarily and usually incident to the business, he should inform the servant of such danger when hiring him, unless the danger is so apparent that the servant will be bound to take notice of it." (75)

20. Whether an employer ought to make a particular rule or set of rules, is a question for the decision of the court and not of the jury. So, also, is the question whether a rule is reasonable or not. "There are strong reasons," says Justice Strong, "why the reasonableness of railroad regulations should, in the absence of any positive proof as to their effect, be submitted to the court, as a question of law rather than to the jury as one of fact. Ordinarily, jurors are not aware, nor can they be readily made aware, of all the reasons calling for the rule. They are apt to listen readily to any allegation of injuries on railways. What one jury might deem an inconvenient rule, another might approve as judicious and proper. There would be uniformity. Ordinarily the managers of railways are much better qualified than jurors to ascertain and weigh the exigencies which call for any rule, and, if it should be productive of some inconvenience, to compare that with the evil to be presented or the good to be produced by its adoption. If the question should be deemed one of law there would be eventual uniformity, as any diversity of sentiment in the courts below would be finally harmonized in the court of last resort." (74)

In view of the numerous wanderings of the courts in trying to answer the question who are fellow-servants, we are not convinced by this reasoning of judicial infallibility. It is true that the final court may make a deliverance concerning a rule which other courts

(73) *Atlas Engine Works v. Randall*, 100 Ind. 293, 297.

(74) *Vedder v. Fellows*, 20 N. Y. 126, 131.

(75) *Zollars, J., Louisville R. v. Wright*, 115 Ind. 378, 387, the court citing *Hawkins v. Johnson*, 105 Ind. 29, 35; *Pittsburg R. v. Adams*, 105 Ind. 151; *Bradbury v. Goodwin*, 108 Ind. 286.

must in the future follow, but the final court might go as far astray in doing this as a jury. Surely, all of them cannot be right that are floundering in the hopeless sea of decisions rendered on the questions, who are fellow-servants, that will soon be reviewed. This principle, however, has been established almost everywhere. (76)

Section 8.

The Delegation of Duties.

1. The duties of the employer to furnish competent employes, suitable appliances, etc., above described are personal, and if he delegate them to another his responsibility is not changed. The New York Court of Appeals has remarked: "We understand the principle to be that acts, which the master as such, is bound to perform for the safety and protection of his employes, cannot be delegated so as to exonerate the former from liability to a servant who is injured by the omission to perform the act as duty, or by its negligent performance, whether the non-presence or mis-presence is that of a superior officer, agent or servant, or of a subordinate or inferior agent to whom the duty of the act or the performance of the duty has been committed. In either case, in respect to such act or duty, the servant who undertakes, or omits to perform it, is the representative of the master, and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally or whether he did or did not do all that he personally could do by selecting competent servants or otherwise, to secure the safety of his employes." (76)

(76) Whether a rule or regulation is reasonable is a question of law:

Illinois: *Illinois Central R. v. Whittemore*, 43 Ill. 420; *Chicago R. v. McLallen*, 84 Ill. 110.

Iowa: *Hoffbauer v. Railroad*, 52 Iowa, 342.

New York: *Vedder v. Fellows*, 20 N. Y. 126; *Nacy v. Railway Co.*, 9 Bos. 396; *Tullis v. Hassell*, 54 N. Y. Sup. Ct. 397; *Larow v. New York R.*, 61 Hun 11. Ohio: *Wolsey v. Railroad*, 33 Ohio St. 334.

Tennessee: *Louisville R. v. Fleming*, 14 Lea 128.

In New Jersey and Georgia, the reasonableness of a rule is a question for the jury: *State v. Overton*, 24 N. J. 435; *Prather v. Railroad*, 80 Ga. 427.

In some cases the reasonableness of a rule is declared to be a mixed one of law and fact. *Pittsburg R. v. Henderson*, 37 Ohio St. 539; *Chicago R. v. McLallen*, 84 Ill. 116; *Bass v. Railroad*, 36 Wis. 459; *Commonwealth v. Prosser*, 7 Met. 596; *Day v. Owen*, 5 Mich. 520.

(76) *Fuller v. Jewett*, 80 N. Y. 46, 52; *Flike v. Boston & Albany R.*, 53 N. Y. 549; *Booth v. Boston & Albany R.*, 73 N. Y. 38; *Mehan v. Syracuse R.*, 73 N. Y. 585.

Likewise the Supreme Court of Massachusetts (77) has declared that "the agents who are charged with the duty of supply safe machinery are not to be regarded as fellow-servants of those who are engaged in operating it. They are charged with a master's duty to his servants. They are employed in distinct and separate departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require."

2. The rule had not been long in existence before the court began to pare it down. While clinging to the first part of the rule, that an employer could not relieve himself from liability to furnish suitable appliances, etc., by delegating another, however competent, to perform this duty for him, he could relieve himself from this responsibility for keeping them in repair by appointing a competent person to do this for him. Massachusetts led off in this departure. In *Johnson v. Boston Tow Boat Co.*, (78) the court said: "One employed in the care, supervision and keeping in ordinary repair of the means and appliances used in a business, is engaged in the common service. Thus, a person charged with the duty of keeping the track of a railway in repair, the chief engineer on a steam vessel, whose duty it is to examine the order; on 'underlooker' in a mine, whose duty it is to examine the roof of the mine and prop it when dangerous; the general foreman and manager of extensive builders and contractors." And in *King v. Boston & Worcester R.*, (79) Justice Fletcher said: "If a corporation itself should be held responsible to its servants that the road, when first used, was safe and sufficient, yet keeping the road in proper repair afterwards would seem to be the work of servants and laborers, as much as any other part of the business of the corporation." In harmony with this rule the persons in charge of a train upon a railroad are regarded as fellow-servants with a laborer employed in repairing the road-bed. (80)

The language of the courts is not always clear on this point; expressions are added by the courts from time to time that leave the reader in doubt concerning what the rule is. Thus, in the case above mentioned, of *Johnson v. Boston Tow Boat Co.*, the court remarked, in the earlier part in their opinion: "The defendant was under obligation to its servants to use reasonable diligence to maintain in suitable condition the appliances furnished for their use. If the defendant exercised that diligence, and provided suitable means for keeping the appliances in proper condition, and employed

(77) *Ford v. Railroad*, 110 Mass. 240.

(78) 135 Mass. 209, 212.

(79) 9 Cush. 112 and 12 Mass. 27.

(80) *Gilshannon v. Stony Brook R.*, 10 Cush. 228.

proper servants to see that the means were properly used, it has fulfilled its duty." The duty to provide suitable appliances, however, is a personal one and liability for any neglect in its performance cannot be evaded, and one might think from reading the above language that the same duty applied to their maintenance and renewal, when, in truth, in that state it does not.

3. In all the states except Massachusetts this modification or limitation of an employer's duty has been resisted. The court of Maine, speaking through Justice Danforth, says: "The same care requisite in hiring a servant in the first instance must still be exercised in continuing him in the service, otherwise the employer will become responsible for his want of care or skill. The employer will be equally liable for the acts of an incompetent or careless servant whom he continues in his employment after a knowledge of such incompetency or carelessness, or when in the exercise of due care he should have known it, as if he had been wanting the same care in hiring. The same may very properly be said of the machinery. The servant has no more control of the repairs than of the purchase, no more responsibility for the one than for the other. The use of it is for him, and the risk of that use whatever it may be he assumes. That comes within his contract but as part of the same contract; and, as a matter of course, he assumes the responsibility that his work shall be done with due care, and, as the responsibility continues, so long as the means are used, so must the same care be exercised in keeping the required means in the same safe condition as at first." (81)

4. In a more recent case in Michigan, the Supreme Court remarked: (82) "The rule may now be considered as settled in this state, as well as in most of the states, not only that a master is bound to use reasonable care in providing safe tools and appliances for the use of workmen in his employ, but that this is a duty which cannot be delegated to another, so as to relieve him from personal responsibility. The rule adopted by the federal courts, and in most of the states, and which seems to us most in consonance with reason and humanity is that those employed by the master to provide or keep in repair the place, or to supply the machinery and tools for labor, are engaged in a different employment from those who are to use the places or appliances, where provided, and they are not, therefore, as to each other, fellow-servants." As they are not fellow-servants, of course the employer is liable in all cases of negligence in making repairs.

5. It will be seen, therefore, that the rule turns on the question, whether those engaged in making repairs are agents of the em-

(81) *Shanny v. Androscoggin Mills*, 66 Me. 420, 425.

(82) *Sadowski v. Michigan Car Co.*, 84 Mich. 100, 105, 106.

ployer or co-servants with the others. If they are agents, then the master is liable; if they are fellow-servants, then the rules applying to fellow-servants applies to them. In the larger number of cases they are held to be agents and not fellow-servants.

6. The case of *Davis v. Central Vermont R.* (83) is one of unusual interest. A fireman was killed by the washing out of a culvert. It was in an improper condition and this resulted from the negligence of the bridge builder and road master. The defendant contended that the bridge builder, road master and section boss were fellow-servants of the fireman, and that their negligence could not be imputed to the road. In answering this contention the court said: "If the master personally attempts to discharge that part of the work which the relation devolves upon him, and his negligence therein causes injury to the workman, the master is liable therefor. The question is naturally suggested, why should he not also be liable for the negligence of the agent or servant, whom he has appointed to discharge the same duty in his stead, although he has exercised due care to select a person competent and skilful. To such an agent or servant, while performing the duty cast by the relation upon the master, a fellow-workman with the master's servant in the employment, in such a sense that the latter cannot and ought not to recover of the master for injuries sustained through the negligence of the former? If so, the master who performs his part of the duty, as this defendant and all corporations must, by agents and servants, secures an immunity from liability which the master who personally enters the service to manage and direct the performance of the work does not enjoy." (84)

The rule in New York has been clearly stated by Judge Bradley, in the case of an employe in an iron foundry who was injured by a ladle or bucket that was in need of repair. "As the duty," said the court, "was with the defendant to furnish and maintain suitable instrumentalities for the service and to supply a safe place for its employes to do their work, it is responsible to the plaintiff for his injuries if they resulted solely from the defendant's failure to exercise reasonable care in that respect. The separation and adjustment of the apparatus attached to the ladle for its use come within the duty which the defendant assumed to perform, and the servant who did it, whatever may have been his grade in the general service, represented the defendant, and for the consequences of his negligence in the performance of it the defendant is responsible." (85)

(83) 55 Vt. 84.

(84) *Hand v. Vt. & Canada R.*, 32 Vt. 473.

(85) *Sherer v. Holly Mfg. Co.*, 86 Hun 37, 41, citing *Pautzar v. Tilly Mining Co.*, 99 N. Y. 368; *Bushby v. New York R.*, 107 N. Y. 374; *Krauz v. Long Island R.*, 123 N. Y. 1; *Hankins v. New York R.*, 142 N. Y. 416; *Wannamaker v. City of Rochester*, 44 N. Y. State Rep. 45.

In truth, for many years Massachusetts and New Jersey were against the entire field in holding that a repairer was a fellow-servant. At last New Jersey retreated, declaring in a recent case, that "on this topic a rational distinction would seem to be that when the employe's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not entrusted with the master's duty to his fellow-servant, and the master is not responsible to his fellow-servant for his fault, but that if the master has cast a duty of inspection or repair upon an employe who is not engaged in using the apparatus in a common employment with his fellow-servant, then that employe in that duty represents the master, and the master is chargeable with his default." (86) Though this rule is not so broad as that existing in most of the state, it is a wide departure from the former one. (87)

The Supreme Court of Massachusetts still bravely sticks to its first rule unmoved by the fact that the federal courts and courts of every other state hold to the opposite one, and unmoved by the

In the following cases a repairer represents his employer and is not a fellow-servant:

United States: *Western Coal Co. v. Ingraham*, 70 Fed. 219; *Gowen v. Busk*, 76 Fed. 349.

Colorado: *Wells v. Coe*, 9 Col. 159; *Denver Tramway Co. v. Crumbaugh*, 23 Col. 363.

Illinois: *Tudor Iron Works v. Weber*, 31 Ill. App. 306, s. c. 129 Ill. 535; *Monmouth Mining Co. v. Erling*, 148 Ill. 521.

Indiana: *Mitchell v. Robinson*, 80 Ind. 281; *Romana Oalitic Stone Co. v. Phillips*, 11 Ind. App. 118; *Neutz v. Jackson Hill Coal Co.*, 139 Ind. 411.

Iowa: *Brann v. Chicago R.*, 53 Iowa 595; *Greenleaf v. Illinois Central R.*, 29 Iowa 14; *Baldwin v. St. Louis R.*, 68 Iowa 37.

Kansas: *Atchison R. v. McKee*, 37 Kan. 592; *Soloman R. v. Jones*, 30 Kan. 601; *Union Pacific R. v. Fray*, 43 Kan. 750.

Maine: *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; *Shanny v. Androscoggin Mills*, 66 Me. 420.

Michigan: *Fox v. Spring Lake Iron Co.*, 89 Mich. 387; *Van Dusen v. Betellier*, 78 Mich. 492.

Missouri: *Hughlett v. Ozark Lumber Co.*, 53 Mo. App. 87; *McMillan v. Union Press Brick Works*, 6 Mo. App. 434.

North Carolina: *Chesson v. Roper Lumber Co.*, 118 N. Car. 59.

South Carolina: *Gunter v. Graniterville Mfg. Co.*, 18 S. Car. 262.

Texas: *Houston R. Co. v. Marcelles*, 59 Texas 334; *Mo. Pacific R. v. McElyea*, 71 Texas 386; *Sabine R. v. Essing*, 1 Texas Civ. App. 531.

Vermont: *Houston v. Brush*, 66 Vt. 331.

Wisconsin: *Shultz v. Chicago R.*, 40 Wis. 589; *Brabbits v. Chicago R.*, 38 Wis. 298.

Pennsylvania: *Penn. Canal Co. v. Mason*, 109 Pa. 296; *Mullan v. Steamship Co.*, Pa. 32.

Virginia: *Norfolk R. v. Ampey*, 93 Va. 108.

(86) *Nord Deutscher Lloyd S. Co. v. Ingrebregsten*, 57 N. J. Law 400, 402.

(87) *McAndrews v. Burns*, 39 N. J. Law 117; *Rogers Locomotive Works v. Hand*, 50 N. J. Law 464; *Essex Co. Electric Co. v. Kelly*, 57 N. J. Law 100.

fact that a more conspicuous example of erroneous judicial logic could hardly be given. Surely, if there is anything in the principle that it is the primary duty of an employer to furnish a suitable appliance in the beginning, the responsibility for which cannot possibly be escaped by delegating the work of selection to another, the duty of repairing it, whenever this is done by a person appointed for the purpose, is none the less the duty of the employer, the responsibility for which he cannot throw on another.

7. Corporations have precisely the same duty as individuals in selecting competent employes for the service required of them; proper places for their employment, and proper appliances for them to use. The fact that the duty must be performed by an agent, president, manager, superintendent or other official in no wise changes the duty or liability of the corporation itself. The rule has been well stated by Justice Gray: "A corporation must, and a master who has an extensive business often does, perform this duty through officers or representatives; but the duty is his and not merely theirs, and for negligence of his duty in this respect he is responsible. To hold otherwise would be to exempt a master, who selected all his machinery and servants through agents or superintendents, from all liability whatever to their fellow-servants, although he had been grossly negligent in the selection or keeping of proper persons and means for conducting his business. In the case of a corporation, the president and directors at least cannot be deemed mere servants, but must be considered as representing the corporation itself." (88)

Of railroads in selecting agents the Supreme Court of Michigan has said that "the charge of looking after various divisions of business and of local management must of necessity be given to many subordinates of greater or less authority, and each of these must be intrusted with considerable discretion, not only in managing the business, but also in choosing their inferiors in position. It is incumbent on the principal, whether individual or company, to have safe rules of business, and to use care in selecting such agents as are immediately appointed. It is also a duty to remove such persons, or to change such regulations, as they have reason to believe unfit. But, until informed to the contrary, they have a right to trust that an agent or officer, carefully chosen, will use good judgment in making his own appointments and doing his own duties; and they have a right to rest upon that belief until in the exercise of that general vigilance which devolves upon themselves, they find they have been mistaken, and, as all men are liable to

(88) *Gilman v. Eastern R.*, 13 Allen 433, 441; *Fifield v. Northern R.* 42 N. Hamp. 225; *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198; *Couch v. Watson Coal Co.*, 46 Iowa 1721; *Frazier v. Pennsylvania R.*, 38 Pa. 104.

errors, no one can be bound to treat an agent as incompetent unless for some error or misconduct going to his general fitness for the place." (89)

One other statement of the rule may be given, that of Justice Myrick, of the Supreme Court of California: "An officer having charge of a department of business is the person required to use that degree of diligence in the selection of competent employes, machinery and appliances which is necessary to exempt a company from liability for their negligence. Corporations are liable for injuries arising from the negligence or carelessness of agents or officers in the course of their employment, the same as individuals.

"Whenever the nature of the business is such as to involve the appointment of subalterns by middlemen, and to withdraw the principal from the management of the business, then the principal is liable for the negligence of the middleman in making the appointment, on the ground that the negligence is that of the principal, and not that of the fellow-servant of the plaintiff. A fortiori is this the case when the middleman has direct authority to make such appointment; otherwise it is hard to see in what case a corporation which appoints and dismisses only through a general superintendent, can be liable for negligence." (90)

8. Who are the agents of a corporation, is a question asked by Justice Fletcher fifty years ago, but not answered. "No corporation can act only through the agency of some individual person or persons, a question has sometimes been made as to what particular officer or persons should be considered as the corporation itself, as distinct from the servants of the corporation, for the purpose of settling what should be considered as the neglect of the corporation itself, and not of its servants." Elsewhere we have given an answer. (91)

9. Competency is a question of fact. Only in cases, therefore, when an injury has happened to a servant through the action of another can the question be answered whether the injured servant or the one who injured him was competent. Thus, in one of the cases a servant on a street railway, who was injured by the negligence of the motorman, tried to show that the company had not exercised ordinary care in selecting him. Evidence was taken concerning his fitness and the court declared that the company was not remiss in performing its duty. (92)

(89) *Michigan Central R. v. Dolan*, 32 Mich. 513.

(90) *Beeson v. Green Mt. Mining Co.*, 57 Cal. 20, 30.

(91) *King v. Boston & Worcester R.*, 9 Cush. 112, 115.

(92) *Gier v. Los Angeles Co.*, 108 Cal. 129.

Section 9.

Temporary Employment.

1. The assumption of risk by the employe has been stretched even further and covers another class of cases, in which an employe is required to perform other duties more dangerous and complicated than those embraced in the original hiring. If these are undertaken, knowing their dangerous character, the risk is assumed and there can be no recovery for an injury received while executing them. He may not, and doubtless does not, receive any greater reward for assuming the larger risk, on the other hand, it is assumed rather than lose his place. In *Leary v. Boston & Albany R.*, (93) the question was fully considered. The person injured was aiding as fireman on an engine, and knew that this duty was not within his original contract as a laborer. He determined to perform it as a part of his engagement with the defendant rather than lose his position as a laborer. In so doing, he was held to have assumed its necessary risks.

"The plaintiff did this, it is true, rather than lose his position which he had, and which he desired to retain, but by so doing he engrafted this duty on his original contract of which it made a part. Morally, to coerce a servant to an employment, the risk of which he does not wish to encounter, by threatening otherwise to deprive him of an employment he can readily and safely perform, may sometimes be harsh, but when one has assumed an employment, if an additional and more dangerous duty is added to his original labor, he may accept it or refuse it. If he has an executory contract for the original service, he may refuse the additional and more dangerous service; and, if for that reason he is discharged, he may avail himself of his remedy on his contract. If he has no such contract, and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks; and while he may require of the employer to perform his duty, he cannot recover for an injury which occurs only from his own inexperience. The employer is not necessarily unjust, because he wishes in his employ a servant who can from time to time relieve a skilled workman, while his ordinary duties will be those of a mere laborer. It must certainly be his right to engage a servant who, while his ordinary duties will be simple and expose him to no danger, is willing as a part of his service, from time to time to assume duties which, in order to be safely performed, require a higher degree of skill, and which expose him to a certain degree of danger." (94)

(93) 139 Mass. 580, 587.

(94) *Houston R. v. Fowler*, 56 Tex. 452; *Pittsburg R. v. Adams*, 105 Ind. 151, 167; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548.

2. But this is not the rule in all the states. In Indiana, the court has declared that the servant's "implied assumption of risks is confined to the particular work and class of work for which he is employed. There is no implied undertaking except as it accompanies and is a part of the contract of hiring between the parties." Consequently, when a servant is put at work outside of his employment, and is injured by reason of defective machinery, railroad track, etc., without his fault, the master is liable regardless of the care he may have exercised to keep the machinery, railroad track, etc., in a safe condition. "When a servant is thus ordered to work at a particular place, or with particular machinery, etc., outside of his employment, the master impliedly assures him, not only that he has exercised reasonable care to have the place, machinery, etc., in a safe condition, but also that they are used." (95)

3. There is a qualification to the rule. "The master will not be liable if the circumstances are such as to show that the servant is competent to apprehend the danger, and expressly or impliedly assumes the risk, or that his knowledge of the danger was equal to that of his master." (96)

Thus, in one of the cases, a common laborer was temporarily employed in performing a hazardous service, the nature of which he did not understand. Though consenting to perform it, this did not defeat his right of recovery, for he did not understand the risk he was incurring. (97) But if he had understood the danger the master would not have been liable. This may be illustrated by the case of a "trammer" in a mine, who was directed by the captain to assist the miners to "fix the roof—take down some ground." While doing so he was injured by the falling of a rock from the roof which had just been tested in his presence and seemed solid. He had been at work in this mine for several months and knew the dangers. He could not recover. The court remarked: "That when an employe of mature years and of ordinary intelligence and experience is directed by the employer to do a temporary work outside of the business he was engaged to do, and consents to do such work, without objection on account of his want of knowledge, skill or experience in doing such work, no negligence can be predicated upon such state or facts alone. (98) This rule may not be applicable where such temporary work is entirely different in kind, and the perils of which are such that the servant could acquire no

(95) *Pittsburg R. v. Adams*, 105 Ind. 151, 164, 166; *Cole v. Chicago R.*, 71 Wis. 114; *Chicago R. v. Bayfield*, 37 Mich. 205; *Jones v. Lake Shore R.*, 49 Mich. 575.

(96) *Cole v. Chicago & Northwestern R.*, 71 Wis. 114.

(97) *Gill v. Homrighausen*, 79 Wis. 634; *Davidson v. Cornell*, 132 N. Y. 228; *Paule v. Florence Mining Co.*, 80 Wis. 356; *Mann v. Oriental Print Works*, 11 R. I. 152; *Bensing v. Steinway*, 101 N. Y. 547.

(98) *Cole v. Chicago & Northwestern R.*, 71 Wis. 114.

knowledge of them in the business for which he was engaged, or where the servant against his objection, is forced to perform such temporary work. The very nature of his employment, the necessary conditions which surrounded him while so engaged and the experience he concedes to have had, forces the conviction that at the time of the accident, he must have known that loosened rock was liable to fall out and injure any one who happened to be underneath." (99)

The Supreme Court of Missouri has thus expressed the rule: "When a servant of mature years undertakes any labor outside the duties he has engaged to perform, the risks incident to which are equally open to the observation of himself and the master, the servant takes upon himself all such risks. But if an injury results to such a servant from defects unknown to him, but known to the master or ascertainable by ordinary care on his part, and ascertainable as easily by the servant, the master will be liable." (100)

A federal judge has thus formulated the rule: "Where the employer places one employe under the control and direction of another, and the latter in the exercise of the authority so conferred orders the former into a place of unusual danger and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the master is liable. This for the reason that, in giving such an order, the superior servants stands in the place of the employer.

"If the employer or his authorized agent leads the employe to expose himself to a danger not ordinarily incident to the employment which is known to the former and unknown to the latter, whereby the latter is injured, an action may be maintained to recover damages for such an injury.

"If the danger is apparent, and is as well known to the employe as to the employer, the former takes the risk of it; but if the employer knew, or by the exercise of ordinary care might have known, that the employment was hazardous to a degree beyond that which it fairly imports, he is bound to inform the latter of the fact or put him in possession of such information." (1)

There is a principle that covers many of the cases of injury while temporarily employed in some manner different from the original hiring. As we have seen the most general of all rules is that the master must provide reasonably safe places for his employes, and his duty to keep them in this condition is equally imperative. Now, if an employe who has engaged to work in such a place, and is taken out of it temporarily and put in another place less safe, that act

(99) *Paule v. Florence Mining Co.*, 80 Wis. 350.

(100) *Cummings v. Collins*, 61 Mo. 520; *Hulett v. St. Louis R.*, 67 Mo. 239,

(1) *Thompson v. Chicago R.*, 14 Fed. 564.

in all cases is the act of the employer. It is true, that it may, and generally is, done in fact by some foreman or other person in his employ, but this never excuses the master. Says Chief Justice Ruger: "The rule is unqualified that a master is bound to use all reasonable care, diligence and caution in providing for the safety of those in his employ, and furnishing for their use in his work safe, sound and suitable tools, implements, appliances and machinery in the prosecution thereof, and keeping the same in repair. This is the master's duty and he cannot exempt himself from liability for its omission by delegating its performance to another, or having required work to be done by omitting precaution and inquiries as to the time and manner of performance." (2) Now, in many cases of temporary employment in which the employe is subjected to a new hazard, the act must be regarded as the employer's. Is such an act a negligent one on his part? Often it is. It is in all those cases in which the hazard is greater and this is known by the employer and is not known by the employe. On the other hand, if the employe does know and comprehends the new risk, he assumes it, and his employer is relieved from the consequences. (3)

4. If an employe undertakes a temporary service at the request of another fellow-servant, or one having no authority from the master over him, then, of course, the master cannot be held liable for the consequences, however serious or well intentioned he may have been. (4)

(2) *Bensing v. Steinway*, 101 N. Y. 547.

(3) Cases relating to temporary employment:

Connecticut: *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548.

Indiana: *Copper v. Louisville R.*, 103 Ind. 305; *Atlas Engine Works v. Randall*, 100 Md. 293.

Maine: *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; *Wormell v. Maine Central R. Co.*, 79 Me. 397, 410.

Massachusetts: *Russell v. Tillotson*, 140 Mass.; *Leary v. Boston & Albany R.*, 139 Mass. 587.

Missouri: *Cummings v. Collins*, 61 Mo. 520; *Hulett v. Railway Co.*, 67 Mo. 239.

Michigan: *Chicago R. v. Bayfield*, 37 Mich. 205.

New York: *Bensing v. Steinway*, 101 N. Y. 547; *Wright v. N. Y. Central R.*, 25 N. Y. 570.

Pennsylvania: *Rummil v. Dilworth*, 111 Pa. 343.

Rhode Island: *Mann v. Oriental Print Works*, 11 R. I. 152.

Wisconsin: *Paule v. Florence Mining Co.*, 80 Wis. 356; *Cole v. Chesapeake R.*, 71 Wis. 114.

United States: *Thompson v. R.*, 14 Fed. 564; *Railroad v. Fort*, 17 Wall. 553.

(4) *Knox v. Pioneer Coal Co.*, 90 Tenn. 546.

CHAPTER IV.

THE ORDINARY RISKS ASSUMED BY EMPLOYEES.

1. As we have seen, when an employe agree to labor for a specified compensation, the contract implies that he takes on himself all the natural risks and perils incident to the service. The law presumes, either rightly or otherwise, that the risks are considered in adjusting the amount of compensation he is to receive. "Where the nature of the service is such that, as a natural incident to that service, the servant must be exposed to the risk of injury from the negligence of other servants of the same employer, or from the use of dangerous machinery, such risk is among the natural perils which the servant assumes upon himself, as between himself and the master; and, consequently, there is no liability of the latter to the former for injuries resulting from the negligence of other servants or co-employes in the same common employment, or the use of such machinery. If, however, the master has wrongfully and unjustifiably enhanced the risk to which the servant is exposed beyond the natural risk of the employment, which must be presumed to have been in contemplation when the employment was accepted, as by knowingly or negligently employing incompetent or unfit servants, or supplying defective machinery, in such cases the master may be held liable for the consequences of such negligence." (5)

The rule on this subject is well stated by Chief Justice Cockburn, as follows: "Where a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means, to guard against and prevent any defects from which increased and unnecessary danger may occur. No doubt when a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to all the risks incidental to it; or, if he thinks proper to accept an employment on machinery defective from its construction, or from want of proper repair, and with the knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment. The rule that I am laying down goes only to this, that the danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or from the nature of the employment, the servant had a right to expect that it would be kept." (6) The Supreme Court of Maryland after

(5) *Cumberland & Penna. R. v. State*, 44 Md. 292.

(6) *Clark v. Holmes*, 7 H. & N. 943.

quoting the above added: "There are many cases maintaining the same general proposition, and the law may be regarded as settled in accordance with this opinion." (7)

2. Looking more closely at this exposition of the law, what does the court mean by "the natural risks or perils incident to service?" By "natural" the court doubtless means the usual or ordinary risks or perils. Thus, in the case of a locomotive engineer, the risks from running his engine, supposing or believing it is in a fit condition. But the difficulties at once begin to thicken. The ordinary or usual condition of an engine on a railroad like the Pennsylvania, for example, is better than on a road in a bankrupt condition. Again, even the engines on the Pennsylvania railroad differ in respect to their condition. The engines for moving the fastest trains must be kept in the highest possible state of efficiency in order to make the requisite speed, and those for running the slower trains while equally safe, perhaps in some respects even more so, for the service required of them, are kept in a somewhat different condition. Again, the engines used for hauling freight are made differently, and are kept in a different condition than those for hauling passengers. The natural risk, therefore, assumed by an engineer is the risk of running a particular kind of engine unless he is employed to serve on any kind of engine fit for the service it may be assigned. If his terms of employment are broad enough to cover the natural risks resulting from the running of an engine fit for any kind of service, then, in the event of an injury, the above inquiry would be less difficult. But in many cases an employe is transferred from one machine to another of the same kind perhaps, though less safe. Is his employer liable for any injury attending the transfer? Much depends on the contract for hiring, what did the natural risk cover?

A good illustration of the difference between a usual and an unusual risk is contained in the case between *Strahlendorf v. Rosenthal*. (8) A person was employed in digging a well, and while doing his work assumed all the usual risks of the undertaking. But when he was far down the excavation, the curbing above bent and cracked—strong signs of giving way. Of this the employer knew, but not his employe. Finally the curbing did give way and the employe was injured. It was held that he did not assume the extraordinary hazard of which the employer had clear knowledge. Said the court: "If there existed some extrinsic cause, known to the defendant and unknown to the plaintiff, which increased the hazards of such employment beyond its ordinary and usual hazards, the defendant was bound to inform the plaintiff of the fact which thus increased the perils of the work;" and of the existence of such

(7) 44 Md. 292.

(8) 30 Wis. 674.

a cause he certainly did have knowledge. On the other hand, an experienced miner assumes the risk of danger from the falling of ore where this is likely to happen in the ordinary course of his work. (9)

3. An employe may assume, as we have shown, other risks besides natural ones; unusual or extraordinary risks and to these there is hardly any limit. A machine may be very defective and dangerous to run, but if this is known by the employe, no deception is used, if he comprehends or ought to comprehend the business and the peril, and undertakes to operate it, he assumes the risk. The Supreme Court of New Jersey has thus stated the principle: (10) "Where one enters upon a service he assumes to understand it and takes all the ordinary risks that are incident to the employment. And if this presents special features of danger which are plain and obvious, he also assumes the risk of these." There are multitudes of such cases, and if an employe is injured by one of these, he has no cause of action against his employer.

4. Another rule should be mentioned that is daily applied. "Notwithstanding the general rule that the master is bound to furnish safe and sound materials, machinery, etc., yet if the work upon which the servant is employed consists in whole or in part, in handling unsafe or unsound things, known to him to be so, and which, by the very nature of the business, must be handled while in that condition, the servant assumes the risk for doing so. Thus, a railway servant, employed to removed damaged cars to a repair shop, has no right to complain of injuries suffered from the known defects of such cars. And where a business is obviously dangerous, and is conducted in a manner which is fully known to the servant at the outset, he assumes the risk of its conduct in that manner, although a safer method could have been adopted." (11)

Says the Supreme Court of Indiana: "When a servant enters upon an employment which is, from its nature, necessarily hazardous, he assumes the usual risks and perils of the service. In such cases it is held that there is an implied contract on the part of the servant to take all the risks fairly incident to the service and to waive any right of action against the master resulting from such risk. The master in such cases impliedly agrees not to subject the servant, through fraud, negligence or malice, to greater risks than those which fairly and properly belong to such particular service." (12)

(9) *Paule v. Florence Mining Co.*, 80 Wis. 350.

(10) *Foley v. Jersey City Electric Light Co.*, 54 N. J. Law 411.

(11) *Sherwood, Ch. J.*, *Thomas v. Mo. Pacific R.*, 109 Mo. 187, 200.

(12) *Griffin v. Ohio & Miss. R.*, 124 Ind. 326, 327; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Pittsburg R. v. Adams*, 105 Ind. 151; *Taylor v. Evansville R.*, 121 Ind. 124; *Lake Shore R. v. McCormick*, 74 Ind. 440.

It will be noted that the risk here assumed is not one growing out of the negligence of employed or employer. Cars, for example, become injured and it is needful to remove them, and in so doing a risk greater than the ordinary daily risk is incurred. The employer is not negligent in seeking to have such cars removed; he would be if he did not direct this to be done. As he is not negligent in securing their removal, neither is an employe negligent who undertakes to do the work. The risks are of daily occurrence that fall under this rule.

CHAPTER V.

FIRST INFRACTION OF THE RULE—EMPLOYEES ASSUME ALL APPARENT RISKS.

1. The first great invasion of the rule defining the duties of employers was that an employe, besides assuming the natural, ordinary risks of his employment, also assumes such risks as are, or ought to be apparent to him by ordinary observation; in other words, such risks as are readily discernible by a person of mature age and capacity in the exercise of ordinary care. (13) Thus, a person

(13) Arkansas: *St. Louis R. v. Davis*, 54 Ark. 389; *Fordyce v. Lowman*, 57 Ark. 160; *St. Louis R. v. Higgins*, 44 Ark. 293.

Colorado: *Burlington R. v. Liche*, 17 Colo. 280.

Illinois: *Chicago R. v. Lonergau*, 118 Ill. 41; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Chicago v. Merckes*, 36 Ill. App. 195; *United States Rolling Stock Co. v. Chadwick*, 35 Ill. App. 474; *Litchfield Co. v. Romanie*, 39 Ill. App. 642; *Toledo R. v. Black*, 88 Ill. 112; *Toledo R. v. Ashbury*, 84 Ill. 429.

Indiana: *Lake Shore R. v. McCormick*, 74 Ind. 443; *Rietman v. Stolte*, 120 Ind. 314; *Louisville R. v. Orr*, 84 Ind. 50.

Kansas: *Sanborn v. Railway Co.*, 35 Kan. 292; *Kansas Pacific R. v. Peavey*, 34 Kan. 472; *McQueen v. Railroad*, 30 Kan. 689; *Jackson v. Railway Co.*, 31 Kan. 761.

Maine: *Wormell v. Maine Central R.*, 79 Me. 397.

Maryland: *Michael v. Stanley*, 75 Md. 464.

Michigan: *Fort Wayne R. v. Gildersleeve*, 33 Mich. 256; *Botsford v. Michigan Central R.*, 33 Mich. 256; *Michigan Central R. v. Smithson*, 45 Mich. 212; *McGinnis v. Canada Southern Bridge Co.*, 49 Mich. 466; *Hewitt v. Flint R.*, 67 Mich. 61; *Grand v. Railway Co.*, 83 Mich. 564; *Schroeder v. Car Co.*, 56 Mich. 132; *Jolly v. Railway Co.*, 93 Mich. 370; *Swaboda v. Ward*, 40 Mich. 420; *Illick v. Railway Co.*, 67 Mich. 638; *Day v. R. Co.*, 42 Mich. 525; *Breen v. R. Co.*, 56 Mich. 620.

Minnesota: *Wilson v. Railway Co.*, 37 Minn. 326; *Anderson v. Skeley Lumber Co.*, 47 Minn. 128; *Anderson v. Morrison*, 22 Minn. 274, 276; *Clark v. Railway Co.*, 28 Minn. 128; *Bengtson v. Railway Co.*, 47 Minn. 486; *Hughes v. Railway Co.*, 27 Minn. 137, 140; *Larson v. Railway Co.*, 43 Minn. 423; *Olson v. Railway Co.*, 38 Minn. 117; *Morse v. Railway Co.*, 30 Minn. 465; *Larson v. Railway Co.*, 43 Minn. 423; *Johnson v. St. Paul R.*, 43 Minn. 53.

New Jersey: *Foley v. Electric Light Co.*, 54 N. J. Law 411.

Iowa: *Mayes v. Chicago R.*, 63 Iowa 562; *Kuhns v. Wisconsin R.*, 70 Iowa 561; *Kroy v. Railroad*, 32 Iowa 357.

was employed to run an old machine, but its condition was not concealed from or unknown by him. He knew as much about it, and the risk attending its use as the master. The court declared that the latter "could not be required to provide himself with other machinery or with new appliances, nor to elect between the expense of so doing, and the imposition of damages for injuries resulting to servants from the mere use of an older or different pattern. The general rule, therefore, is that the servant accept the service, subject to the risks incidental to it, and where the machinery and implements of the employer's business are at that time of a certain kind or condition, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards." (14)

One of the judicial statements of the rule is the following: "If employe after having a full and fair opportunity to become acquainted with the risk of his situation, makes no complaint whatever to his employer as to the machinery which he knows to be wanting in appliances for safety, takes no precaution to guard against danger, but, accepting the risks, voluntarily continues in the performance of his duties, he cannot complain if he is subsequently injured by such exposure. He is not bound to risk his safety in the service of his master, and he may, if he thinks fit, decline to do that which exposes him to peril."

2. A fuller statement of the modification of the general rule governing employers has been made by Justice Devens: "Though it is a part of the implied contract between master and servant that

Ohio: *Mad River R. v. Barber*, 5 Ohio St. 563; *Lake Shore R. v. Knittal*, 33 Ohio St. 463.

Oregon: *Wellman v. Railway Co.*, 21 Oregon 530; *Carlson v. Railway Co.*, 21 Oregon 450.

Pennsylvania: *Payne v. Reese*, 100 Pa. 301; *Rummill v. Dilworth*, 111 Pa. 343; *Lehigh Coal Co. v. Hayes*, 128 Pa. 294; *Barkdoll v. Railway Co.*, 13 At. 82; *New York R. v. Lyons*, 119 Pa. 324; *Blossman v. Railway Co.*, 113 Pa. 490; *Hawk v. Railroad Co.*, 11 At. 459; *Green & Coates St. Pass. R. v. Bresmer*, 97 Pa. 103.

South Carolina: *Carter v. Oliver Oil Co.*, 34 S. Car. 211; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262; *La Sure v. Graniteville Mfg. Co.*, 18 S. C. 275; *ex parte Johnson*, 19 S. C. 492; *Davis v. Railway Co.*, 21 S. C. 93.

Texas: *Gulf R. v. Williams*, 72 Texas, 159; *Rogers v. Galveston City R.*, 76 Texas 502; *Missouri Pacific R. v. Somers*, 71 Texas 700; *Houston R. v. Barrager*, 14 S. W. 242; *Gulf, H. & San Antonio R. v. Drew*, 59 Texas 10.

Wisconsin: *Whitman v. Wisconsin R.*, 58 Wis. 408; *Naylor v. Chicago R.*, 53 Wis. 661; *Stephenson v. Duncan*, 73 Wis. 406; *Abbott v. McCadden*, 81 Wis. 563.

(14) *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 520, 524; *De Forest v. Jewett*, 88 N. Y. 264; *Gibson v. Erie R. Co.*, 63 N. Y. 449; *Odell v. New York Central R.*, 120 N. Y. 324; *Hickey v. Taaffe*, 105 N. Y. 26; *Williams v. Delaware & Lack. R.*, 116 N. Y. 628; *Davidson v. Cornell*, 132 N. Y. 228; *Kain v. Smith*, 89 N. Y. 375; *McGovern v. Central Vt. R.*, 123 N. Y. 280; *Stringham v. Hilton*, 111 N. Y. 88; *Burke v. Wetherbee*, 98 N. Y. 562; *Henry v. Staten Island R.*, 81 N. Y. 373; *Laning v. Railroad*, 49 N. Y. 521; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Naylor v. Chicago & Northwestern R.*, 53 Wis. 661.

the master shall provide suitable instruments for the servant with which to do his work and a suitable place where, when exercising due care himself, he may perform it with safety, or subject only to such hazards as are necessarily incident to the business, yet it is in the power of the servant to dispense with this objection. When he assents, therefore, to occupy the place prepared for him, and views the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care, and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precaution has been neglected." (15)

3. "Every employer," says Justice Foster, (16) "has the right to judge for himself in what manner he will carry on his business, as between himself and those whom he employs, and the servant having knowledge of the circumstances, must judge for himself whether he will enter his service, or, having entered, whether he will remain."

"The employe," says Justice Taylor, "when accepting an employment, assumes all the risks that are reasonably incident to such employment, and no other, unless the unusual and unreasonable risks of such employment are open and visible and known to and comprehended by the employe, and in such case he assumes all the risks so known to him, whatever they may be." The same court said in another case: "The servant is bound to know, and is said to have assumed, all such dangers of the employment as were open and obvious, and such as he could have discovered by reasonable attention." (17) "He is not bound to know of any defect or omission, and assumes no risk therefrom, if it were practically impossible or unusual for him to ascertain all the special perils." (18)

"The servant takes upon himself the natural and ordinary risks

(15) *Sullivan v. India Mfg. Co.*, 113 Mass. 396, 398.

(16) *Wormell v. Maine Central R.*, 79 Me. 397, 405; citing *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 121; *Shanny v. Androscoggin Mills*, 66 Me. 427; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 585; *Ladd v. New Bedford R.*, 119 Mass. 413.

(17) *Nordau v. White River Lumber Co.*, 76 Wis. 130.

(18) *Beeson v. Green Mt. Mining Co.*, 57 Cal. 20, 29. An employe was injured by the derailment of a car on an unfinished track on which he was working. He knew of its condition, therefore, and had assumed the risk: *Evansville R. v. Henderson*, 142 Ind. 596. An employe who attempted to ride on an engine over an unfinished road and was warned of his danger before starting by the superintendent assumed the risk of injury: *Niles v. Minneapolis R.*, 65 N. Y. 103.

and perils incident to the performance of his labors, whether arising from the carelessness of fellow-servants in the same line of employment or from the manner in which the work is carried on. The qualification to this rule is that the danger contemplated in entering into the contract shall not be aggravated by any omission on the part of the master to keep the surroundings in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect they would be kept." (19)

4. The reason for the rule has been well stated by the Supreme Court of New Jersey. "Obvious dangers which the servant enters upon voluntarily are impliedly assumed by him, if he continues in the service. If the servant knows of the defect and it is of such a nature that a prudent person will not abandon the service on account of it, then no negligence can be charged to the master for permitting the defect to continue. If the plaintiff (in the case before the court) was justified in concluding that he could (do the thing desired) ascend a pole and return with safety, by using extra care, the defendant had the right to draw the same conclusion; and in that event the defendant was in no fault if the peril was of that imminent character that it was imprudent on the part of the plaintiff to ascend the pole, there, under the rule of law laid down by the trial court the verdict was wrong. If the plaintiff acted as a prudent man in undertaking to ascend the pole, the injury must be ascribed to mere accident—the casual slipping of the foot. In that case neither he nor his employer is to be held guilty of a want of ordinary care. The servant and the master had equal means of forming a correct judgment. Therefore, whatever want of prudence in taking the risk is chargeable to the one must be imputed to the other. The attempt to engraft this exception upon the general rule introduced the element of the absence or presence of due prudence on the part of the servant into this discussion, which is a circumstance, in my judgment, wholly foreign to it. The immunity of the master rests upon the contract of hiring, and not upon the absence or presence of negligence in either part. The master says to the servant: 'You understand fully the nature of the employment, and the danger attending it. Will you enter upon it?' The servant says: 'I accept it,' and the law implies that he accepts it with all the risk incident to it, without regard to the magnitude of the danger. The question is not whether it was prudent on his part to encounter the peril. In contemplation of law, his undertaking to assume the apparent risk of the work was general and unqualified. He might have restricted his assumption of danger by stipulating that he would take upon himself such liability

to injury only as could be avoided by ordinary care on his part. In the absence of such a term in the engagement, it cannot be introduced by implication without changing its import, and importing into it a condition unfavorable to the master, and which has not his consent. The cases rigidly hold the doctrine that the servant takes upon himself such definite and determinate risks as are obvious, and no action will be against the master for injuries to the servant in such cases." (20)

5. "Although it is not negligence or a breach of legal duty for a master to hire men to work on an old machine merely because there are newer and safer ones in use, yet many of the courts of this country hold that steam railways are bound to keep pace with new inventions in the direction of safety. But this rule is an exceptional one, established upon grounds of public policy, and for the safety of human life. It has never been applied to the relation of master and servant. There the ordinary rule is that the workman takes the risks incidental to his employment." Such are the words of Judge Brown, (21) and they are, doubtless, a correct statement of the law. But why should the law have more regard for the lives of the passengers of a railway than for the lives of its workmen? Are not the latter in quite as helpless condition as the former? Are not many of the risks known and assumed by them assumed unwillingly, because they must do so to find employment? If public policy requires railroads to adopt every improved safety device for the safer carriage of their passengers, ought not public policy to enforce a rule equally imperative for the safe treatment of their workmen?

6. It may be further remarked that a servant does not assume the risks incident to the use of unsafe machinery if he simply knows it is defective, but does not comprehend the risk. "In some cases," the court has remarked, "the risk is obvious on inspection of the thing itself. In other cases the servant may know the character and condition of the instrumentality which he is called upon to use, and yet not have the means of knowing the nature or extent of the risks to which its use will expose him. The master and servant do not necessarily stand on equal footing in this regard. The servant, although a man of ordinary prudence as well as experience, may be quite incapable of appreciating the degree of risk involved in the use of a certain kind of machinery, while the master may be and generally is. It is the master's duty to inform himself in that regard, for on him is involved the duty of exercising ordinary care to supply safe instrumentalities to his servant; whereas the latter has a right to assume, in the absence of

(20) *Foley v. Electric Light Co.*, 54 N. J. Law 411.

(21) *The Maharajah*, 40 Fed. 785.

notice to the contrary, or something to put him on inquiry, that the master has performed his duty, and, hence, to a certain extent, to rely on the superior judgment of his master. Hence, it is sometimes said that although a servant may have known of the defects, this will not defeat his recovery unless he knew that the defects rendered the thing dangerous. So, against, it has been held that a servant only assumes a risk which is announced to him, or which is a natural and ordinary incident to the employment, or which, from the facts before him, it was his duty to infer." (22) "It is one thing," says Justice Mitchell, "to be aware that machinery is defective, or in a particular condition, and another thing to know or appreciate the risks resulting therefrom. A man of ordinary intelligence and experience may know the actual condition of an instrument with which he is working, and yet not know the nature and extent of the risks to which he is exposed." (23)

7. If a defect or imperfection is apparent and the employe proceeds to work on an assurance given by the employer that it is safe to do so, the employer is liable for the consequences. Says Justice Henry: "In that class of cases the defect or imperfection is apparent, and, to one experienced in the work or in the implements, the danger is also apparent. In such cases, unless the extra hazard is so palpable that no man of ordinary intelligence and prudence would, at the risk of life or limb incur it, the master would be liable to a servant whom he should order to perform the dangerous work, or work not dangerous with implements defective and unsafe." (24)

8. When an employe is exposed to an unusual peril which is known to the employer, but not to the employe, it is not assumed. (25)

(22) *Russell v. Minneapolis R.*, 32 Minn. 230, 234; *Cook v. St. Paul R.*, 34 Minn. 45.

(23) *Wuotilla v. Duluth Lumber Co.*, 39 Minn. 153, 155.

(24) *Aldridge v. Midland Blast Furnace Co.*, 78 Mo. 559, 565.

(25) *Connecticut: Wilson v. Willimantic Linen Co.*, 50 Conn. 433.

Illinois: Chicago R. v. Avery, 109 Ill. 314; *Richardson v. Cooper*, 88 Ill. 270; *Pennsylvania Co. v. Lynch*, 90 Ill. 333.

Indiana: Lake Shore R. v. McCormick, 74 Ind. 440; *Columbus R. v. Arnold*, 31 Ind. 174; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Cincinnati R. v. McMullen*, 117 Ind. 439; *Cincinnati R. v. Roesch*, 126 Ind. 445.

Maryland: Wonder v. Baltimore & Ohio R., 32 Md. 418; *Baltimore & Ohio R. v. Stricker*, 51 Md. 47.

Massachusetts: Lawless v. Railroad, 136 Mass. 1.

Minnesota: Eicheler v. St. Paul Furniture Co., 40 Minn. 263.

New York: Ellis v. Railroad, 95 N. Y. 546.

Pennsylvania: Payne v. Reese, 100 Pa. 301.

South Carolina: Gunter v. Graniteville Mfg. Co., 18 S. Car. 262.

Wisconsin: Behm v. Armour, 58 Wis. 1; *Naylor v. Railroad*, 53 Wis. 661; *Bessex v. Railroad*, 45 Wis. 477; *Strahlendorf v. Rosenthal*, 30 Wis. 674.

United States: Washington R. v. McDade, 135 U. S. 571; *Hough v. Railroad* 100 U. S. 213; *Railroad v. Fort*, 17 Wall. 553.

Thus, in one of the earlier cases an accident happened to an employe from a defect in a floor which was known by the employer but not by the employe. The employer was held liable. The rule more fully expressed is this: An employer who knows that a dangerous place exists in his premises, for example, is responsible for an injury caused thereby to a workman entering there by his master's order and not notified of the danger, unless he also has not exercised proper care. (26)

The principle was also applied in the case of an injury to a brakeman from an unknown projecting awning. Said the court: "It would have been morally impossible for him to have ascertained the existence of all such special perils as this, which caused the injury, and there is no reason for supposing that he had acquired such knowledge before the accident, as he had been but two months upon the road, and had always passed the station, where he was injured, in the night, except upon two trips. But the peril had long before been observed by other employes, and the attention of both the division superintendent and the division engineer called to it. This circumstance takes away all excuse from the company, and brings the case within the legal proposition that it was a peril known to the employer and not revealed to the employe." (27)

In another case a workman was injured by falling through a defective floor. He passed over the floor during his daily employment and knew that it was decayed, but did not know the extent of its weakness. The court, speaking through Chief Justice Chapman, remarked: "The evidence in this case does not tend to show that the defendant's machine shop was not properly built, but it does tend to show that a portion of the floor, over which the plaintiff had occasion to pass in the discharge of his duty, had been for a considerable time in a state of decay, and had become unsafe. It also tends to show that the defendants knew, or by the exercise of reasonable diligence would have known, what its condition was, for they had the means of making as thorough an examination as could be necessary to learn its condition, not merely by observing its surface, but by going under it and examining the foundations on which it rested, as well as the extent of the decay. And if they were negligent in allowing it to become rotten or dangerous, or in not making themselves acquainted with its condition, so far as they could do so by reasonable diligence, they had made themselves liable to any of their servants who should be injured by the defect unless he also was negligent." (28)

(26) *Sweeny v. Old Colony & Newport R.*, 10 Allen 368; *Elliot v. Pray*, 10 Allen 378; *Zoebish v. Tarbell*, 10 Allen 385; *Combs v. New Bedford Cordage Co.*, 102 Mass. 572, 584; *Huddleston v. Lowell Machine Co.*, 106 Mass. 282, 285; *Brossman v. Lehigh Valley R.*, 113 Pa. 490.

(27) *Illinois Central R. v. Welch*, 52 Ill. 183.

(28) *Huddleton v. Lowell Machine Shop*, 106 Mass. 282.

In another case a servant was declared not to have assumed a risk the danger of which he had no reasonable opportunity to find out. (29) Thus, if machinery of an unusual and more dangerous character is produced, and the employe has no notice of the danger, he does not assume the risk attendant upon its use. (30) When, therefore, an accident happens from such a cause the question is, Did the employe know of the danger or would he have known of it by exercising ordinary care? In the following cases it was held that he had not the necessary facilities for obtaining a knowledge of the peril to which he was exposed to have enabled him to avoid it, and he was chargeable with no want of due care. (31)

9. Furthermore, if the place becomes defective in any way, less secure or more dangerous to the workman, and he does not know this and continues his employment, his employer is liable for the consequences. (32)

In such cases it would be unreasonable to suppose that an employe would assume them; indeed, in one sense, it would be impossible for him to assume risks of which he had no knowledge. (33) The courts, therefore, have declared with essential unanimity that "where an employer knows the danger to which his servant will be exposed in the performance of any labor to which he assigns him, and does not give him sufficient and reasonable notice thereof, its dangers not being obvious, and the servant, without negligence on his own part, though inexperienced, or through reliance on the directions given, fails to perceive or understand the risk, and is injured, the employer is responsible. The dangers of a particular position or mode of doing work are often apparent to a person of capacity or knowledge of the subject, while others, from youth, inexperience, or want of capacity, may fail to appreciate them; and a servant, even with his own consent, is not to be exposed to such dangers, unless with instructions and cautions sufficient to enable him to comprehend them, and to do his work safely with proper care on his own part. But the servant assumes the dangers

(29) *McCormick Harvesting Machine Co. v. Burandt*, 136 Ill. 170, 177.

(30) *Pennsylvania Co. v. Whitcomb*, 111 Ind. 221; *Baltimore & Ohio R. v. Rowan*, 104 Ind. 88.

(31) *Chicago R. v. Shannon*, 43 Ill. 339; *Chicago R. v. Swett*, 45 Ill. 197; *Toledo R. v. Fredericks*, 71 Ill. 294; *Toledo R. v. Ingraham*, 77 Ill. 309.

(32) *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Fifield v. Northern R.*, 42 N. Hamp. 225.

(33) *Davidson v. Cornell*, 132 N. Y. 228, 235; *Smith v. Car Works*, 60 Mich. 506; *Fox v. Peninsular Car Works*, 84 Mich. 676; *Behm v. Armour*, 58 Wis. 1; *Naylor v. Railway Co.*, 53 Wis. 661; *Bexxes v. Railway Co.*, 45 Wis. 477; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Baltimore & Ohio R. v.*; *Central R. v. Rowan*, 104 Ind., 88; *McCormick Harvesting Machine Co. v. Burandt*, 136 Ill. 170; *Swaboda v. Ward*, 40 Mich. 420.

of the employment to which he voluntarily and intelligently consents, and, while ordinarily he is to be subjected only to the hazards incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions." (34) The inquiry, therefore, takes this form, Did the employe know of the defect? If he did, he cannot recover. (35) Though not knowing, would he have known had he exercised ordinary care? If so, he cannot recover, nor is forgetfulness of the danger usually any excuse. In some cases, though, it is held that if he was so absorbed by his work while doing his duty as to forget the danger he may perhaps recover. (36)

10. There is another distinction between fixed risks and changing risks that must be noticed. A railroad switch or frog is an example of the first kind, a bush overhanging a track the other. An employe may assume the former risk because it is known, while he may still hold his employer for any injury growing out of the latter. "The distinguishing principle," says Judge Gilbert, "between these two classes of cases is that in the one the defects are visible and apparent, and the dangers therefrom are presumed to be known and assumed, while in the other the danger is not seen, and no such presumption arises. The condition of the switches and frogs, the degree of the curvature of the track are all fixed conditions, which are visible to the eye. The experienced employe knows that he is to serve the railroad company with its roads and cars in the condition in which he sees them, and he knows the danger that may attend such service. But he does not necessarily know, and he cannot be expected to meet, dangers which arise from changes in those conditions, however apparent may be the causes which produce them. He is not presumed to know that the rains and floods will have covered the track with earth and sand at a place where common prudence would require that provision be made against the occurrence of such an obstruction. He is not required to assume that ice and snow will be allowed negligently to accumulate upon the track and switches, or that other obstructions will be placed on or above the same, so as to render the track unsafe, or his work more dangerous than it otherwise would be." (37)

(34) *Leary v. Boston & Albany R.*, 139 Mass. 580, 584, citing *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572.

(35) *Baltimore & Ohio R. v. Strickler*, 51 Md. 70; *Wells v. R. Co.*, 56 Iowa 525; *Brossman v. Lehigh Valley R.*, 113 Pa. 490; *Bengston v. Railroad Co.*, 47 Minn. 486; *Wallace v. Central Vt. R.*, 63 Hun 632; *Haley v. Jump River Lumber Co.*, 81 Wis. 412.

(36) *Hannah v. Conn. River R.*, 154 Mass. 529. See *Kane v. Railway Co.*, 128 U. S. 94.

(37) *Oregon Short Line v. Tracy*, 66 Fed. 931, 935.

11. "If the defects in the machinery or other appliances are as well known to the employed as to the employer, the former must be regarded as voluntarily incurring the risk resulting from its use, unless the employer, by urging on the servant or coercing him into danger, or in some other way, directly contributes to the injury." (38) What, then, is left of the rule requiring suitable appliances, etc.? If they are furnished, the employer's duty is fulfilled and an injury to his servant is without redress. If they are not furnished, he is not responsible if his employes knew or ought to have known of their imperfect character. But if they are unsuitable, and they did not know, or could not have known by ordinary observation, then their employer is liable. Thus, this principle relieves the employer wholly from all responsibility for the condition of his machinery, from boxing it or guarding it in any manner; it relieves him from employing men to warn of danger, unless his duty to do these things have been re-imposed on him by statute. The fragment of responsibility still remaining is to make known dangers to employes unless they know them, or are such as may be known by ordinary observation. If they are, then the employe assumes them and the employer is relieved of all liability. (39)

This, therefore, is one of the fragments still left of the fundamental rule. If the employer knows of defects or imperfections that are unknown to his employe or would not be by ordinary observation, the employer is liable for the consequences that may happen to his employe from working in ignorance of the dangers surrounding him.

It will be seen, however, that the question is always open in every case in which the danger was not known, Ought the employe to have known it? This is a question of fact, and the decision in one case throws no light on another. If the rule was limited to actual knowledge, an employe would have a great advantage over his employer. By proving the injury and his ignorance of the danger his case would be made out. If this were the rule, we fear that the reign of ignorance would rapidly increase. On the other hand, by permitting the employer to prove that his employe ought to have known of the danger, the case is thrown into the shade of uncertainty. This modification, as will be seen, makes shipwreck of the rule requiring employers to furnish suitable appliances, places and servants, so far as employes know or ought to have known of their true condition. An employer is left quite free to use a defective machine, which cannot be run without danger, so long as the employe knows, or ought to know its true character. The little qualifi-

(38) *Gibson v. Erie R.*, 63 N. Y. 449, 453; *Laning v. New York Central R.*, 49 N. Y. 521.

(39) *Gilbert v. Guild*, 144 Mass. 601.

cation concerning defects, the dangerousness of which the employe does not fully comprehend does not take the edge off the modification, and it still affords shelter for the employer in numberless cases in which he would otherwise be held liable for transgressing the fundamental rule of duty.

Again, it cannot be questioned that this overthrow of the former rule requiring employers to furnish suitable appliances, etc., is a violent break in the general law of negligence. The fundamental principle of the law is, if one is injured through the negligence of another, the offending party must make the other's loss good. But an employer may be negligent, may run a machine which he knows is imperfect and dangerous, and if his employe knows it he assumes the consequences. Thus, the law imposes no checks on his negligence. The consequence is, the law promotes negligence instead of checking it, which it could easily do by making the employer liable therefor. Numberless things are done by employers that would not be done if the law visited on them the consequences of their conduct.

We must not forget, however, to look on the other side. If an employer is often negligent in using machinery which he knows is defective and dangerous, the employe is just as negligent when he operates it, knowing its real condition. There is no great merit in his contention in many, if not all, of such cases, because he too is a participant in the wrong-doing by using the defective thing. Only in those cases in which the employer knows and the employe does not know has the latter a clear case for redress.

12. This modification of the most general rule of employment is not limited to ordinary labor. It has been applied more widely. Therefore, if "a person specially undertake to perform a peculiarly perilous work, by operating a machine obviously wanting in suitable appliances for safety, knowingly and voluntarily, he cannot afterwards complain, in case of injury, in consequence thereof, that the machinery was of a dangerous kind, and that it was wanting in appliances reasonably necessary to render it safe." More briefly expressed, an employe cannot recover for an injury caused by voluntarily assuming a known risk. No matter how defective the appliances may be, or hazardous the place of employment, or incompetent his fellow-laborers, if one undertakes employment with his eyes wide open, knowing these things, he takes the risks and can recover nothing in the event of injury. (40)

(40) Pennsylvania: *Rummell v. Dilworth*, 111 Pa. 343, 349; *Green & Coates Sts. Pass. R. v. Bresmer*, 97 Pa. 103; *Marsden v. Haigh & Co.*, *Brossman v. Lehman Valley R.*, 113 Pa. 490; *McCombs v. Railroad*, 130 Pa. 182; *Payne v. Reese*, 100 Pa. 301.

Rhode Island: *Gaffney v. New York R.*, 15 R. I. 456; *Kelley v. Silver Spring Co.*, 12 R. I. 112; *McGrath v. New York R.*, 14 R. I. 357, and 15 R. I. 95.

13. We ought not to close this chapter without re-stating an important principle still binding employers. Though they may furnish defective appliances, incompetent employes, and the like and be free from responsibility to those who know what has been done, this rule does not apply to other employes who are working in ignorance of these matters. With respect to those who know, "the master," says the court in one of the most recent cases, "who has furnished a place to work in, free from non-obvious or latent danger, or has instructed his servant, upon entering his service, expressly as to these, if they exist, has used the due care which the law prescribes as his duty in the premises." (41) The master's liability to them under these conditions are the same as though he had furnished safe appliances, places for work, etc., in the beginning. But this rule applies only to those who know or ought to know of the true character of the appliances, etc., and to those who are ignorant, without any fault on their part, the master is still liable. Thus, an employer may have an unsafe boiler on his premises, and the engineer, knowing of its condition, may assume the risk and, if injured by an explosion, be unable to recover anything. But suppose an employe a little way off, who knew nothing about the defective boiler, is injured? The employer must respond to him, and he must do so even though the engineer was neglectful. In other words, as the master has not observed the rule to furnish a safe boiler, he is liable for the consequences to any employe who did not know this even though the engineer was neglectful on his part. His neglect furnishes no excuse for the master. Says Justice Danforth, speaking for the New York Court of Appeals: "It is no doubt settled in this state that an employe of a railroad company takes the natural risks of his employment, and, among others, the risk of injury resulting from the negligence of his fellow-servants. This rule, however, has no application if the company has at the same time disregarded its obligation to provide either a suitable road-bed or engines, cars, or other necessary appointments of the railroad, so that the injury is not entirely caused by the negligence of the other fellow-servant, but in part at least is the result of that omission of duty.

Massachusetts: *Moulton v. Gage*, 138 Mass. 390; *Williams v. Churchill*, 137 Mass. 243; *Lovejoy v. Boston & Lowell R.*, 152 Mass. 79; *Gilbert v. Guild*, 144 Mass. 601; *Russell v. Tillotson*, 140 Mass. 201; *Sullivan v. India Mfg. Co.*, 113 Mass. 398; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 585; *Ladd v. New Bedford R.*, 119 Mass. 412; *Osborne v. Morgan*, 130 Mass. 102; *Leary v. Boston & Albany R.*, 139 Mass. 580; *Taylor v. Carew Mfg. Co.*, 140 Mass. 150; *Linch v. Segamore Mfg. Co.*, 143 Mass. 206; *Hatt v. Nay*, 144 Mass. 186.

(41) *Bethlehem Iron Co. v. Weiss*, 40 U. S. Ct. of App. 270, 275.

In such a case the negligence of the co-servant will not exonerate the company from the consequences of its own default." (42)

In another case a train broke apart in consequence of having a defective brake and the conductor was killed by a collision resulting therefrom. The company tried to shield itself from liability to the representatives of the conductor behind the negligence of the brakeman in using the brake, the condition of which it was contended he had discovered several hours before. Said the court: "Very likely this is true, but it does not affect the liability of the master, nor bring the case within the rule exempting the latter from responsibility for the negligence of a fellow-servant. The master who is bound to provide safe machinery for the use of his servants is not relieved from responsibility to an employe for a neglect of that duty by the fact that a fellow-servant may have been guilty of negligence in using unsafe apparatus which was committed to him to use. (43) The question would have been a very different one had the brakeman, if injured, tried to recover of the company. He would have failed because he knew of the condition of the brake and assumed the risk."

One other case may be cited, of an injury to a saw-mill worker from a defective machine, with which he had nothing to do. Said the court: "If the saw-mill company by its neglect has unnecessarily increased the danger attendant upon the use of the machine, it is liable for an injury to an employe who is not himself guilty of negligence, resulting from the use of such imperfect and dangerous machine; and it is no excuse for the company that some one of its employes was careless in the use of such dangerous machine, and that if it had been carefully handled the accident would not have occurred." (44)

This doctrine has been very forcibly stated by President Judge Lewis: "The servant, moreover, although he assumes the ordinary risks of the business, including the negligence of fellow-servants,

(42) *Ellis v. New York Central R.*, 95 N. Y. 552; *Grand Trunk R. v. Cummings*, 106 U. S. 700; *Towns v. Vicksburg R.*, 37 Lea. Ann. 630; *Farren v. Sellers & Co.*, 39 La. Ann. 1011.

(43) *Ransier v. Minneapolis R.*, 32 Minn. 331; *Cone v. Delaware R.*, 81 N. Y., 206; *Booth v. Boston & Albany R.*, 73 N. Y. 38.

(44) *Richmond & Danville R. v. George*, 88 Va., 328; *Sherman v. Menominee River Lumber Co.*, 72 Wis. 122, 127. The court cited *Cayzer v. Taylor*, 10 Gray 274; *Avilla v. Nash*, 117 Mass. 318; *Paulmier v. Erle R.*, 34 N. J. Law 155; *Booth v. Boston & Albany R.*, 15 Hun. 172; *Railroad v. Henderson*, 37 Ohio St. 599; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Grand Trunk R. v. Cummings*, 106 U. S. 700; *McMahon v. Henning*, 1 McCrary 516; *Papworth v. Milwaukee*, 64 Wis. 389, 402; *Stetler v. Chicago R.*, 46 Wis. 497, 510; *Schultz v. Chicago R.*, 48 Wis. 375, 381.

does not contract against the combined negligence of a fellow-servant and his employer." (45)

14. A negligent act cannot be excused because it is customary, but proof of custom is evidence, although not conclusive, that the act is not negligent. (46)

15. When a person is injured by a defect and he sues to recover for an injury sustained, is the inquiry simply one of fact to ascertain whether the defect was obvious or not? In some states liability is made to turn on this inquiry, was the defect obvious; if it was, the employe knew it, or ought to have known it, and the employer is not liable. The more general rule is, had the master the right to assume the employe would know it because it was plainly visible. (47)

CHAPTER VI.

SPECIAL RULES RELATING TO THE ASSUMPTION OF RISKS.

1. We will not proceed to consider the rules applying to particular kinds of risks. In these there are often two questions: first was the employe injured by a natural risk, the consequences of which he assued; secondly, if the risk was not of this character, did he know of its existence and assume it? As the consequences to him are the same in both cases, we propose to treat both classes of cases together.

2. As far more mishaps occur in the building, repair and operation of railroads than in any other form of human activity, let us begin with the special rules that have been worked out and applied to these accidents. Of these, low overhead bridges have been a sadly fruitful cause of accidents and litigation. In the states like New Jersey and Maryland, where the building of them is regarded as proper and not negligence, there is little occasion for legal controversy arising from their use, but in most states such structures are deemed the creations of negligence and the railroads, therefore, may be held responsible under some circumstances for having them. Elsewhere we have shown what principles apply to this class of cases and seemingly hardly any other questions now remain to puzzle the courts except those of fact relating to such accidents. The principal questions usually are, was the in-

(45) *Richmond & Danville R. v. George*, 88 Va. 328; *Faren v. Sellers & Co.*, 39 La. Ann. 1011.

(46) *Flanders v. Chicago R.*, 51 Minn. 193, 197; *Kelly v. Southern Minn. R.*, 28 Minn. 98; *Kolsti v. Minneapolis R.*, 32 Minn. 133; *Doyle v. St. Paul R.*, 42 Minn. 79; *O'Malley v. St. Paul R.*, 43 Minn. 289; *Larson v. St. Paul R.*, 43 Minn. 423.

(47) *Nadau v. White River Lumber Co.*, 17 Wis. 130; *Dorsey v. Construction Co.*, 42 Wis. 583; *Stephenson v. Duncan*, 73 Wis. 404; *Sweet v. Coal Co.*, 78 Wis. 127.

jured employe duly notified of the existence of the dangerous structure, or did he previously know, so that no warning was required? In one of the latest cases before the United States Circuit Court of Appeals, the company was deemed not liable for the death of a brakeman caused in this manner because he had been duly warned of the danger. Judge Caldwell entered a vigorous dissent: "The employe," he said, "takes all the risks incident to the business, whatever it may be, where that business is conducted in a reasonably careful and prudent manner, and with due regard to the safety of the employes. Dangers which needlessly imperil human life, and which can be removed at little cost, are not dangers necessarily incident to the operation of a railroad, but are dangers which it is the duty of the railroad to remove. Common humanity demands this. Moreover, the state has an interest in the lives of her citizens, and will not permit an employer needlessly to imperil the lives of his employes. The very highest consideration of public policy demands an enforcement of this rule. And the peril is unnecessary and needless where, as in this case, it can be removed at slight expense. Notice of the unnecessary peril in such cases goes for nothing." (48)

3. Another long series of accidents have arisen from the placing of buildings, posts, telegraph poles, cattle-chutes, awnings and other structures so close to the sides or tops of the trains as to endanger the lives of those who operate them. The rules that apply to them are quite similar to the rules that are applied to overhead bridges.

The first rule that may be stated is the Massachusetts rule, that and structures which are needful for the prosecution of the general business may be erected so near the tracks as to endanger the lives of the operatives of the trains, nor is the company required to give any notice of their existence. This is the extreme rule, and, happily, is so contrary to the rule perhaps in every other state, that it ought to be exactly stated. Using, therefore, the words of Justice Holmes: "It is necessary for railroad companies to put up structures near enough to their tracks for it to be possible for persons on the trains to come in contact with them. Parallel tracks usually must be laid near enough to each other to create a similar danger between trains moving in opposite directions. A company is not bound to give warning of every such structure to every person employed upon its trains." (49)

The second rule may be called the New York rule, which is simply the application of a very familiar one that a railroad company may use such appliances, machinery as are in common use, even though these may not be safe." This was applied to a mail crane—an

(48) *Myers v. Chicago & St. Paul R.*, 94 Fed. 406.

(49) *Thain v. Old Colony R.*, 161 Mass. 353.

appliance to facilitate the taking into a mail car of mail bags when the car is in motion. An employe having been injured by it, he sought to show that the company was negligent in placing it so near the track. "There was no evidence," said the court, "that the crane in question was placed nearer the track than cranes upon other roads, nor that it was practicable to place a crane at a greater distance than was the one in question, or to construct it with a shorter arm and have it answer the purpose in view. The injured employe took the risk of all constructions necessary and reasonably adapted to the business of the railroad. The burden was upon him to show that the appliance, concededly useful in the business of the defendant, was improperly constructed or located, and this he wholly failed to do. Proof that it was dangerous was not enough. He was bound to go further and show that the defendant might, by the use of reasonable care, have accomplished its purpose and at the same time protected its employes from the danger." (50 This device, though dangerous from its location, was in common use and, therefore, the employes were supposed to know of them. The court does not intimate that if there had been only one, or a single object obstructing the way, or irregular objects, that it would not have been its duty to notify its employes of their existence. The Massachusetts rule contains no such limitation, nor does it exist, for in the case wherein the rule was applied an employe was injured by a post of which he had no knowledge.

The third rule is very different. By this a railroad must place its signal posts and structures at a reasonably safe distance from its tracks, so far as not to be dangerous to brakemen and other operatives on the trains; or to warn them of such dangers if they exist. (51) It is negligence to place them so near as to endanger the lives of employes, and, consequently, it is an imperative duty to warn them of the danger. Thus, it was said of a railroad company that permitted a telegraph pole to stand for three years within eighteen inches of passing cars that it was "culpable negligence." Consequently, the representative of a brakeman who knew nothing of its existence, and was killed by coming in contact with it, had a good claim against the company. (52) Likewise the Supreme Court of Michigan has declared that the constructing and maintaining of a side track by a railroad company so near to a building as to endanger the lives of their employes, was a clear violation of its duty to provide them with a safe place to conduct their employment. (53) To pile lumber dangerously near a track is a negligent

(50) *Sisco v. Lehigh R.*, 145 N. Y. 296, 300, 301.

(54) *Johnson v. St. Paul Co.*, 43 Minn. 53.

(52) *Chicago & Iowa R. v. Russell*, 91 Ill. 298.

(53) *Sweet v. Michigan Central R.*, 87 Mich. 559.

act of the same character. Said the Supreme Court of Wisconsin, in a case in which this was done: "It is as much the duty of the railroad company to keep its track in proper repair, as it is to keep its machinery, engines and cars in such repair; and any neglect to keep them in such repair, or permitting the same to be obstructed in such manner as to increase unnecessarily the danger to its employes is negligence for which the company may be responsible in case of an injury happening to an employe by reason of such want of repair or obstruction." (54)

One other principle may be mentioned. It is negligence for a railroad to permit any posts or other obstructions to remain dangerously near the track which are not required for the ordinary operations of the company, for example, posts set up by a station agent for a domestic purpose. In a case of this nature the Supreme Court of Iowa remarked: "These posts were in no manner connected with the use of the road and plaintiff was not required to direct his attention to the discovery of dangers caused by impediments and structures in no way required in the operation of the road. He was authorized to presume that no such obstructions were in his way, and he cannot be charged with negligence in failing to discover them." (55)

4. Next may be considered the tracks. Several important principles have been established. First, an employe at work on a construction train to haul material over an incomplete track in the manner customary in the construction of railroads assumes the risk incident to such employment and cannot recover for an injury caused by a derailment at a place which is not different from the other parts of the track. (56) In other words, when a road is in process of construction it is not an appliance; and the same rule applies to men who are at work thereon as applies to men who are building a house. Furthermore, men who are repairing a road are governed by the same principle. (57)

The same rule applies to a defective track on which they are at work. They know it is defective, that is the very reason why they are there, and they assume the risk of the situation. (58) Says Justice Long: (59) "As a general rule it is the duty of a railway company to furnish its employes a safe place to work while operating its train; yet the rule must be considered with some qualifications

(54) *Bessex v. Chicago R.*, 45 Wis. 477, 482.

(55) *Kearns v. Chicago R.*, 66 Iowa 599, 601.

(56) *Evansville & Richmond R. v. Henderson*, 142 Ind. 596.

(57) *Id*; *Lindvall v. Woods*, 41 Minn. 212. But see *Meloy v. Chicago & Northern R.*, 77 Iowa 744.

(58) *Brick v. Rochester R.*, 98 N. Y. 211; *Manning v. Chicago R.*, 63 N. W. 312 (Mich.)

(59) *Manning v. Chicago R.*, 63 N. W. 312.

when a new road is being built. The employe cannot complain of the imperfect condition of a road he is employed to assist in making perfect. He assumes greater risks upon such road than upon a completed one, where he might expect that the track was clear and all obstructions removed." As was said in *Carbon v. Railway Co.*, (60) "where a servant is employed to put a thing in a safe and suitable condition for use, it would be unreasonable and inconsistent to require the master to have it in safe condition and good repair for the purpose of such employment."

An employe who is employed by a railway to assist in clearing an obstructed track assumes the risk of washed-out bridges and tracks when there are caused by unusual storms which could not have been anticipated, but he does not assume this risk when the danger might have been discovered and averted by reasonable diligence and proper care. Said the Supreme Court of Oregon of a man thus employed by a railroad company: "It may be admitted that if the performance of his duties had required that he should ride over the track from place to place, where his services were needed to clear the track of obstructions, the risk assumed included the danger of bridges being undermined or swept out by freshets or floods, when they occurred from inevitable accident, but not when the danger might have been ascertained and averted in time to avoid the injury by the exercise of reasonable care and proper precautions." (61)

In assigning men to their places of work, the building or repair of a road, or other purpose, two rules apply. If the road over which they are to go is completed, it is regarded as an appliance, and the same rule that ordinarily applies to the furnishing of safe appliances applies in such cases. It must be suitable for the purpose. (62)

"When the injury results to a servant on account of defective construction, the law does not consider that in entering the service he assumed the risks incident to the defective construction. "On the contrary the company are required to furnish a road-bed properly constructed and properly equipped with sound machinery and apparatus, and the right of way so clear as to reasonably prevent danger from falling timber." (63) But a somewhat different rule applies to a road over which they go that is just finished, or hardly so, the nature of which they understand. The rule that applies in such a case has been well expressed by Justice Elliott, of the Supreme Court of Colorado: "The injured employe could not reasonably expect the road and the road-bed of the defendant company

(60) 28 Pacific 497.

(61) *Conlon v. Oregon Short Line*, 23 Or. 499, 503.

(62) *Brick v. New York & Portchester R.*, 98 N. Y. 211; *Walling v. Construction Co.*, 41 S. Car. 388.

(63) *Texarkana R. v. Vallie*, 60 Texas 481.

to be in as perfect and safe condition before it was finished as if the same had been completed and opened for public travel. Defendant was required to exercise only reasonable care considering the circumstances and condition of its road to provide for the safety of the plaintiff while riding thereon." And, again, "It was the duty of the defendant company to employ a competent engineer or other skilled person to see to it that the road was reasonably safe for the transportation of its workman—not necessarily as safe as a road fully completed and equipped for the carriage of passengers, but as safe as the circumstances of the case would reasonably allow." (64) The remarks of the Supreme Court of Texas are worth adding: "That there must of necessity be a time in the constructing of a railroad when its track is not perfectly safe, we think a proposition that does not admit of doubt. The employes operating a train at such time must be presumed to have assumed the additional risk incident to that state of affairs. But we cannot assent to the doctrine that when a portion of a road is completed and is being operated for construction purposes only, the company is not bound to use all reasonable care in putting it into such condition that its employes, engaged in running trains over it, may use it with safety to themselves and their co-employees." (65)

"With respect to side-tracks, employes may be chargeable with knowledge that they are not always perfect; that they are sometimes constructed over ditches and gullies and are not always ballasted with the same care that main tracks usually are, but railroad companies owe it to their employes to protect them from unnecessary and dangerous pitfalls and unusual conditions." (66)

5. There have been many accidents from the use of switches and frogs, though the legal principles springing from them have not been very important. One of the questions that has most perplexed the judicial mind is whether a frog, or the space between the main rail and the guard rail, ought to be blocked. If it ought to be, then an unblocked frog is an unsuitable appliance and a company is negligent in using it. In discussing this question the Supreme Court of Minnesota has remarked: "Such places unprotected are places of very great danger, especially to men employed in coupling or uncoupling cars, and it is the duty of a railroad company to guard its employes against the danger if there be reasonably practical means for doing so known to it, or which, in the use of proper diligence, intelligence and care may be known to it; and the evidence for the plaintiff clearly indicates devices which the jury might find to have

(64) *Colorado Midland R. v. O'Brien*, 16 Col. 219.

(65) *Gulf R. v. Redecker*, 67 Texas 181, 187.

(66) *McGrath, J., Ragon v. Toledo R.*, 91 Mich. 379, 381; *Ragon v. Toledo R.*, 97 Mich. 265.

been practicable and reasonably adequate and inexpensive, and known, or which ought to have been known to defendants, and which, as to this particular frog, it had omitted." (67) A blocked frog, therefore, is an unsuitable or defective appliance. This, however, is not the rule everywhere.

6. Again, if all the blocking of frogs on a track is uniform except one, and this is defective in construction, an employe cannot be regarded as having assumed the risk of it without having actual knowledge of its condition. (68) But if an employe undertakes his employment knowing the condition of its switches and frogs, then he falls under the general rule and assumes the risks. And in almost all cases the facts have shown that he did know of their condition. The Supreme Court of Arkansas has summarized the law on this subject. "The plaintiff charges negligence in the use of unblocked frogs, not because they were badly constructed, and out of repair or exposed operatives to latent dangers, but because a different kind of frog would have been less dangerous to operatives. Unblocked frogs were in universal use on the roads in this State, including the entire road of the defendant. The injured employe knew, when he entered the defendant's service, that its frogs were unblocked; and if there was danger in their use, he knew it was an incident to the service he was entering. When a master employs a servant to do a particular work with a particular kind of implement or machine, he agrees that they are sound and fit for the purpose intended so far as ordinary care and prudence can discover, but does not agree that they are free from danger in their use. The servant agrees to use in the service the particular kind of implement or machine; and if under such circumstances harm comes to him, it must be ranked among the risks he assumed when he entered the service." (69) Such is the express holding of the courts in several states in which the negligence charged was in the use of unblocked frogs.

7. Besides providing suitable cars, they should be properly loaded. The duties of a company in this regard have been differently defined. In some states the car inspector is required to inspect the load on a car as well as the car itself. Wherever he is regarded as acting for or representing his employer, his employer is responsible for his negligence, for he is not a fellow-servant with the other employes operating trains. (70)

In some states those who load cars are regarded as fellow-servants with engineers, brakemen and others who operate them; in other

(67) *Sherman v. Chicago R.*, 34 Minn. 259.

(68) *Paine v. Eastern R.*, 91 Wis. 340.

(69) *Railway Co. v. Davis*, 54 Ark. 389, 393.

(70) *Atchison R. v. Seeley*, 54 Kan. 21.

states, the work of loading them is that of the employe, and the master has no special responsibility therefor. This is the rule in Indiana. Says the court: "One who loads the cars of a railroad company is, while so engaged, a fellow-servant with the brakeman who goes upon the train in which such loaded cars are afterwards placed, and it makes no difference what official designation of agency may be applied to him. Courts know judicially that loading railroad iron on flat cars pertains to the service of an employe. This is so because a railroad corporation must of necessity employ servants to load its cars. To say that the servant who loaded the cars was always the chief agent and officer of the railroad company, without more, would in no manner change the situation. Regardless of his agency or office in other respects, if he was also properly engaged in loading cars, he was at that time a fellow-servant with all others in like service." (71)

In New York the law requires a railroad to adopt reasonable rules for loading, with the double purpose of protecting its employes and the public. (72) Not to do this is negligence. Furthermore, to project timber or rails beyond the ends of cars, thereby greatly increasing the hazard to brakemen, is negligence. (73) But if a brakeman sees the danger and yet ventures to perform his duty does he not assume the risk, as in so many other cases? In Minnesota, however, the question was left to the jury whether a company was not negligent in hauling a car in that condition, and the jury returned a verdict against the company; furthermore, as it was shown to their satisfaction that the brakeman was not negligent himself in trying to make a coupling with another car, whereby he lost his life, the company was held liable. (74)

Clearly, if a brakeman does not know of a condition of a car thus loaded he is not negligent in attempting to perform his duty. Furthermore, he often has only a very short time to find out how a car is loaded. In such cases he cannot be charged with negligence. But when he does know of the danger, and attempts to make a coupling under such conditions, what then? It is said that he should desist from the effort, or employ some method of avoiding the danger. Should he, knowing the danger, voluntarily incur it, he would also be regarded as guilty of contributory negligence and, consequently, have no cause of action against the company. (75) It is not easy to reconcile the decision of the Minnesota case with

(71) *Indianapolis R. v. Johnson*, 102 Ind. 352, 355.

(72) *Ford v. Lake Shore R.*, 124 N. Y. 493.

(73) *Corbin v. Winona R.*, 66 N. W. 271 (Minn., 1896); *Northern Pacific R. v. Everett*, 14 U. S. Supp. Rep. 474.

(74) *Id.*

(75) *Northern Pacific R. v. Everett*, 14 U. S. Sup. Ct. Rep. 474.

this rule. Ought not the brakeman in that case, knowing as he did of the peril, to have desisted?

8. Next may be considered the subject of brakes, which has been a fruitful source of litigation. We need not repeat the rule, that an employer must furnish safe appliances to an employe, and that when one is employed as a brakeman this means bumpers as well as brakes. (76)

How far must a brakeman exercise the duty of inspection? Some employes have a positive requirement on the subject; others have not. Where no positive rule exists the law does not require an inspection to be made. Says the Supreme Court of Kentucky: "A brakeman is never entrusted with the duty of inspecting, and, therefore, cannot be reasonably expected or required to know whether all the machinery and appliances of a railroad train are in proper condition." (77)

"A brakeman," says Justice Day, "although he may have the means and opportunity of doing so, is not required to go around and under the track with a lantern and hammer for the purpose of ascertaining whether there be any flaw or crack in a wheel or axle. The company employs parties to perform this duty, and the brakeman has the right to suppose that they will perform it properly, and he is justified in leaving the performance of it to them. At the same time he must make a reasonable use of his senses and if a defect is apparent and patent, and would have been discovered by the exercise of reasonable and ordinary care, in view of the position which the brakeman occupies, the law conclusively presumes that he possesses the knowledge which reasonable attention would furnish." (78)

Where a positive rule exists, employes must regard it, and if they do not, are negligent. But this rule can hardly apply to those cases in which brakemen have not time to make an inspection. It evidently means that, where brakemen have a reasonable opportunity, they must employ it in inspecting the brakes committed to their charge. In many cases, however, they are obliged to act very promptly and have no time to make inspections. One of these cases was the *Philadelphia and Reading R. v. Huber*. (79) The brakeman had but two or three minutes to ascertain the condition of the brake; indeed, not even that, for during this time he was occupied in uncoupling cars and calculating and regulating their movements. Consequently the company could not shift the consequences of using

(76) *Evans v. Chamberlain*, 40 S. Car. 104.

(77) *Louisville R. v. Foley*, 84 Ky. 220.

(78) *Way v. Illinois Central Co.*, 40 Iowa 341, 343; *Muldowney v. Illinois Central R.*, 36 Iowa 462, s. c. 39 Iowa 615.

(79) 128 Pa. 63.

the brake, which was defective and dangerous, and had been permitted to remain so. Had the brakeman actually known of this condition, he might have been responsible for using it; but, as he did not know, he could not be charged with negligence in not finding out its condition during the short period of time in which he could act.

When, however, he does know of the defects or imperfections or they are obvious, then he assumes the risks attending their use. Thus, if one car is higher than another, it is obvious that they cannot be united with a straight coupling, and for a brakeman to attempt to do this clearly is negligence. There are many cases of this character. (80)

When a brakeman is injured by a defect or imperfection not in the coupling or other appliance which is more especially within his vision, but by a defect in the track, a hole, for example, then a different principle applies. If he has been notified of the particular defect, then doubtless he must govern himself accordingly, but if he is notified that the track generally is in bad condition, he may hold the company liable for an injury caused by its unfit and unsafe condition of which he had no knowledge. A case of this kind arose in Missouri, and the court remarked that if the master did not know of the defect and reasonable care on his part would not have disclosed it, he would not be liable. If, however, by the exercise of reasonable care the employer could have discovered the defect, he would be liable even though a like exercise of care on the part of the employe would also have led to its discovery. "The servant has a right to assume that the machinery or implements furnished him by the employer are safe and suitable for the business; and he is not, while the master is, required to examine them for that purpose. The master is chargeable with knowledge which he might have acquired by the exercise of due care the same as if he actually possessed it, whereas the servant has the right to assume that all necessary examinations have been made by the master, and is not required, either in person or by another employed by him for that purpose, to examine the machinery as to its fitness and sufficiency." (81)

9. From accidents on railroads we may pass to accidents from the use of machinery in mills and other places. Many of these have happened to young and inexperienced employes from the lack of safeguards. In all such cases the rule is plain; it is the duty of the employer to instruct his employes properly about all the dangers

(80) *Norfolk & Western R. v. Emmert*, 83 Va. 640; *Brewer v. Flint & Pere Marquette R.*, 56 Mich. 620; *Fort Wayne R. v. Gildersleeve*, 33 Mich. 133; *Way v. Illinois Central R.*, 40 Iowa 340; *Muldowney v. Illinois Central R.*, 39 Iowa 615; *Rains v. St. Louis R.*, 71 Mo. 164.

(81) *Henry, J., Porter v. Hannibal & St. Joseph R.*, 71 Mo. 66, 79.

attending its use. This has been applied again and again. The question in these cases is, has the instruction either been given by the employer, or has the employe learned in any other way sufficiently in the performance of his task. If he has become informed his employer is not liable; otherwise he is negligent and responsible therefor. (82)

"If the servant," says Justice Lord, "is acquainted with the dangers, and fully understands the risks to which he is exposed, where the place prepared for him to work is near or about machinery which is not boxed or covered, and consents or chooses to contract to do it, then he assumes such risks, and the master is under no obligation to indemnify him against the consequences of the Having consented or contracted to work in a place or position in which he was exposed to the machinery, he will be held to have understood the hazard attending his employment, and to have voluntarily taken upon himself the consequences of such hazard. In all such cases the contract, although involving dangerous service, has been voluntarily entered into with full knowledge or sufficient negligence to comprehend the hazards or risks to be incurred in the employment, and the servant can have no just ground of complaint against the master for damages resulting from that service.

"But, on the other hand, if the servant is ignorant or inexperienced, and does not know or understand the risks incident to his employment, and to which he would be exposed, and an injury happens to him without any negligence on his part, and without the master warning or pointing out the dangers, he would be guilty of a breach of duty and liable to the servant for the injury he sustained. The distinction rests upon the knowledge of the servant in the one case and the want of it in the other.

"If, therefore, the service required to be performed is dangerous, or rendered so by reason of the master's failure to provide a place where the servant may do his work with safety, but which, by the exercise of due care and reasonable expense on the part of the master, might have been made safe, his omission would be a breach of duty, and render him liable for any injury arising therefrom, unless the servant has knowledge of and comprehends the nature or extent of the risks to which he is exposed at the place provided and thereby dispenses with the performance of this duty on the part of the master; or, unless the master, where the servant is ignorant or inexperienced, points out, or gives him full notice of the risks attending such service at the place to be performed

(82) *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Laning v. New York Central R.*, 49 N. Y. 521; *Hill v. Gust*, 55 Ind. 45; *Kelley v. Silver Spring Co.*, 12 R. I. 112; *White v. Witteman Lithographic Co.*, 131 N. Y. 631.

and thereby enable him to appreciate such risks and to avoid them." (83)

The law does not generally require cogs or belts to be covered, or other dangerous machinery. Says a federal judge: "So far as relates to the absence of the covering upon and around cog wheels this fact has been held by very highly esteemed authorities per re negligence on the part of the employer." (84) In Minnesota the rule is thus stated: "While the safe rule and practice is to protect dangerous machinery if practicable, it is not necessarily actionable negligence to cover or house it in any particular case, though men of ordinary prudence in such cases might do so, for the question of negligence must be determined upon the facts of each case, the question being whether the employer or master has failed in some duty he owed to the servant." (85)

By far the larger number of cases are swept within one or the other two following rules: "The master is not guilty of negligence in setting an employe to work in connection with dangerous machinery although uncovered, if the latter is instructed in respect to the operation of the machinery and the risks so that he might take care of himself; or if the employment and machinery are of such a character that the risks are so apparent that the employe must necessarily comprehend them." (86)

In some cases, either by statute or common law, employers have been regarded as negligent in not covering belts, cogs and other dangerous machinery. Such a statute exists in Wisconsin, and the Supreme Court applied it in a case in which some cog wheels were exposed and a serious accident resulted therefrom. "We have no hesitancy," said the court, "in holding that when the employer places such a dangerous piece of machinery into which his employe by the least forgetfulness or unavoidable accident may be thrown and seriously injured, in the immediate vicinity of a place, where his employe must do his work, he fails to furnish him a reasonably safe place for doing his work and is guilty of gross negligence, especially when the usefulness of the machine is not enhanced by reason of its being uncovered and where the expense of covering would be a mere trifling sum." (87)

(83) *Roth v. Northern Pacific Lumbering Co.*, 18 Or. 205, 21.

(84) *Townsend v. Langles*, 41 Fed. 919; *Schroeder v. Michigan Car Co.* 56 Mich. 132; *Sanborn v. Railroad*, 35 Kan. 292. See *Kelley v. Silver Spring Co.*, 12 R. I. 112.

(85) *Carrott v. Williston*, 44 Minn. 287, 289.

(86) *Carroll v. Williston*, 44 Minn. 289; *Craver v. Christian*, 36 Minn. 413; *Sullivan v. India Mfg. Co.* 113 Mass. 396; *The Maharajah*, 40 Fed. 784; *The Serapis*, 51 Fed. 91; *Kelley v. Silver Spring Co.*, 12 R. I. 112; *Brick v. Firmatich Mfg. Co.*, 82 Iowa 286; *White v. Witteman Lithographic Co.*, 131 N. Y. 631.

(87) *Nadau v. White River Lumber Co.*, 76 Wis. 120, 128.

It does not follow that if an employe is negligent in leaving gear-
ing, for example, uncovered, that it is negligence for another to
work near it, for he may not know of this; or if he does, may not
understand the risk he is taking. (88)

10. Passing from these to accidents in mines, it may be remarked
that care and diligence must be exercised by the master. This,
however, must be commensurate with the danger of the employ-
ment. "Obviously," says Judge Sanborn, "a far higher degree of
care and diligence is demanded of the master who places his servant
at work, digging coal beneath overhanging masses of rock and
earth in a mine, than of him who places his employes on the sur-
face of the earth where danger from superincumbent masses is
not to be apprehended. The degree of care required of the master
and servant also differ because defects with a piece of machinery
or in the roof of a mine that to the eye of a competent inspector,
such as the master employe, portend unnecessary and unreasonable
risks and great danger, may have no such significance to a laborer
or miner who has had no experience in watching or caring for
machinery or roofs of slopes in a mine, and the latter is not charge-
able with contributory negligence simply because he sees or knows
the defect, unless a reasonably intelligent and prudent man would,
under like circumstances, have known or apprehended the risks
which those defects indicate." (89)

From this unusually luminous opinion let us turn to a recent ex-
position of the law on this subject by the Supreme Court of In-
diana: "The nature of the employment is in itself so very hazard-
ous that those who engage in it must know that it is attended with
risks against which human foresight and skill cannot guard. One
of the dangers attendant upon mining is that from falling earth,
stone, slate or coal. These dangers are greatest, perhaps, in the
rooms where the miner works, while the tunnels or entry through
which he may have to pass to and from his work can be more or
less guarded and protected. That, as to all of the dangers ordinarily
incident to the employment, the servant assumes the risks, is ele-
mentary law. But to determine what are the risks naturally and
ordinarily incident thereto, is not always easily done, depending
to a very great extent upon the nature of the employment.

"It may be safe to state, however, as a general proposition, that
under the usual and ordinary contracts of employment between
a master and a servant, whether the engagement be for service in
a factory, on a railroad, or in a coal mine, the master undertakes
to use reasonable care to see that his machinery is in good condi-
tion and repair and that the place where the servant is to work is

(88) *Wuotilla v. Duluth Lumber Co.*, 39 Minn. 153.

(89) *Union Pacific R. v. Jarvi*, 53 Fed. 65, 68, 69,

free from dangers other than those which are naturally attendant upon the work to be performed. Hence, when it is said that a master operating a coal mine shall furnish his servants with a reasonably safe place to work, it is not intended that the place shall be so timbered and guarded that rock, slate, earth or coal cannot fall, because to so protect the working place must necessarily destroy the ability to operate the mine. And if the place furnished by the master appears to the servant to be free from any dangers except those which are naturally incident to the work, the servant, unless he sees that it is not so, has a right to assume that the master has performed his duty and that the place is as it appears. In other words, the servant is not bound to seek for latent defects or dangers, which do not necessarily arise from the nature of the employment, and against which it is the duty of the master to use reasonable care to guard. And when it is said that the servant assumes the risk of dangers of which he has knowledge, it is not meant that he assumes no risks except from dangers of which he has actual knowledge or which are patent, for he does assume the risk of latent as well as patent dangers, which are a mutual incident of the service and which it is not the duty of the master to guard against; that is, dangers, whether visible or invisible, known or unknown, at the time of employment, if they are such as naturally arise from the nature of the work to be performed, he assumes. It is for this reason that he is required to exercise reasonable care to ascertain and know of dangers which may exist or even arise suddenly and confront him during his service.

"Unless the servant by his contract of employment or the nature of the services to be rendered require that he inspect the place where he has to work for hidden or latent defects which are simply the result of the master's inattention or negligence, he is not bound to do so. The duty of inspection to ascertain and guard against dangers and defects not naturally incidental to the work to be performed by the servant, rests upon the master. But as to the dangers which are naturally incident to the service, the servant is bound to acquaint himself, even to the extent, if necessary to do so, of making a minute and thorough inspection. Hence, those dangers which an experienced miner knows must and do threaten him at all times, are an incident to the service and are assumed by him." (90)

To prevent accidents arising from gas and other explosives it is the duty of a mine operator to use all appliances readily obtain-

(90) *Ross, J., Linton Coal & Mining Co. v. Persons*, 15 Ind. App. 69, 71. For other mining cases, see *Bunt v. Sierra Butte Gold Mining Co.*, 138 U. S. 483; *Quick v. Minnesota Iron Co.*, 47 Minn. 361; *Sampson Mining & Milling Co. v. Schoad*, 15 Col. 197; *Paule v. Florence Mining Co.*, 80 Wis. 350.

able known to science for their prevention. (91) Furthermore, a miner does not waive defects in the construction of a mine by continuing to work there until he has had reasonable time to become acquainted with their bearings and the hazards of his employment. (92)

In the case of a miner in Utah that was carefully considered, the Supreme Court said: "It is contended that the plaintiff undertook, for an extra compensation, to perform a hazardous service; that is true, but he only contracted to take upon himself the risks incident to the employment. He did not agree to take extraordinary risks growing out of the negligence of the company, and to which it had not called his attention. The employer owes to his servant the duty of furnishing him a safe and proper place in which to prosecute his work, so far as he is able to do so by the exercise of ordinary care and diligence. This duty he cannot delegate to an agent or servant, so as to excuse himself, or so as to escape responsibility to another, who has been injured by his non-performance. The degree of care exacted of the employer is in proportion to the hazards and perils of the service in which his servants are engaged. The more hazardous the employment the more watchful and careful should the master be to guard against the danger or injury to his servants through insecurity or want of safety in the premises to which his servants are required to prosecute their work." (93)

11. Passing to excavations, these may be briefly considered, for no special principles have been established concerning them. In most cases of this nature—and they are quite numerous—they have been determined by the application of the principle that the employes assumed the dangers attending their employment. They knew what they were quite as well as their employers, and so they had no cause for complaining when injured. If an employer has knowledge which he intentionally conceals, or forgets to give to his employes, concerning the danger, which they do not have, nor could reasonably be supposed to have, then he is liable for not putting them on the same plane as himself. In one of these cases, the Supreme Court of Indiana said: "Where the danger is alike open to the observation of all, both the master and the servant are upon an equality, and the master is not liable for an injury resulting from the dangers incident to the business." (94) In another case, in which a workman was injured by the caving in of a gravel bank, the Supreme Court said: "The law is that if the plaintiff where at work in the gravel bank on the day he was injured, fully knew

(91) *Western Coal & Mining Co. v. Berberich*, 94 Fed. 324.

(92) *Crabell v. Wapello Coal Co.*, 68 Iowa 751.

(93) *Trihay v. Brooklyn Lead Mining Co.*, 4 Utah 468, 475.

(94) *Swanson v. City of Lafayette*, 134 Ind. 627.

the hazards of the work—if he knew that he was at work in a dangerous place, and that the bank of earth above was liable to fall upon him—he cannot recover in this action. In that case it was quite immaterial that the work might have been made safe by detaching earth from the bank above him, or in any other manner. Having such knowledge his implied contract was that he assumed the hazards of the employment incident to the business as it was conducted.” (95)

12. There is a long series of accidents happening from openings in floors, the lack of rails, the careless or negligent opening of doors, which will now be considered. The first rule to be stated is, if an employe knows of a dangerous hole in a floor, bridge or other structure or that a railing does not exist where evidently one ought to be, he cannot recover if he suffers in consequence of the defect. This is merely another application of the familiar rule that when he knows of a risk attending his employment and continues to labor he assumes it. (96)

In *Anthony v. Luret*, (97) an employe was injured by falling through a trap door in a passage way. The court remarked that the employer's negligence, if there was any, consisted in locating the trap door as he did, or in not adequately guarding it. The complete answer to the claim was that the employe knew where the trap door was and by continuing in the employment accepted the hazards incident to the situation, “especially such hazards as might result from the non-observance by co-employes of directions designed for the protection of persons using the passage way. The location of the trap door in the passage way was not per se a wrongful act. The defendants had a right to arrange their own premises in any way which suited their convenience, and were not bound to change the arrangement to secure greater safety to the employes. If the trap door was not open to observation, if its existence was not known to those whose duty required them

(95) *Naylor v. Chicago R.*, 53 Wis. 661, 665. For other cases relating to excavations, see *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Aldridge v. Midland Blast Furnace Co.*, 78 Mo. 559; *Vincennes Water Supply Co. v. White*, 124 Ind. 376; *Calson v. Sioux Falls Water Co.*, 65 N. W. 418 (S. Dak.); *Simmons v. Chicago R.*, 111 Ill. 340; *Griffin v. Ohio & Miss. R.*, 124 Ind. 326; *Naylor v. Chicago R.*, 53 Wis. 661; *O'Driscoll v. Faxon*, 156 Mass. 527.

(96) Cases in which he knows of the risk attending his employment and by continuing, assumes the risk: *Wannamaker v. Burke*, 111 Pa. 423; *Anthony v. Beeret*, 105 N. Y. 591; *Kennedy v. Manhattan R.*, 145 N. Y. 288; *Moulton v. Gage*, 138 Mass. 390; *Gleason v. New York R.*, 138 Mass. 68; *O'Maly v. South Boston Gas Light Co.*, 158 Mass. 135; *Wood v. Locke*, 147 Mass. 604; *Lovejoy v. Boston & Lowell R.*, 125 Mass. 79; *Welsh v. St. Paul R.*, 27 Minn. 367. Cases in which he did not know: *Plank v. New York Central R.*, 60 N. Y. 607; *Hannah v. Conn. River R.*, 154 Mass. 529; *Hoffman v. Clough*, 124 Pa. 505.

(97) 105 New York 591.

to use the passage way, or if the defendants had omitted to give proper instructions to those employed in the planing room, where the employe worked, a different question would be presented."

In Massachusetts employers are required by statute to protect elevators and well holes in a specified manner. Nevertheless, if any employe falls into one, through the lack of proper care on his part he cannot recover. (98)

In another case that occurred in Wisconsin an employe was injured while ascending a steep stairway, without regular steps and no railing. Nevertheless, an employe who had used the stairway once or twice was held to be chargeable with knowledge of its defects and to have assumed the risk of using it. Said the court: "It is certainly true that it is the duty of the employer to furnish his employe a reasonably safe place to work, and with a reasonably safe appliance and apparatus. At the same time it is equally well settled that the employer may conduct his business in his own way although another method may be less hazardous, and the employe takes the risk of the more hazardous method if he knows the danger and enters on the employment. Here the plaintiff must have seen whatever defects co-existed in the construction of the stairway, for such defects were plain and obvious." (99)

A somewhat different principle applies to openings in buildings in process of construction or alteration. In these the rule is still more in favor of the employer. Says Justice Paxson, in the case of a building which was undergoing alteration: "It would be unreasonable to hold employers to the same degree of strictness during alterations to the building as might be required after such alterations were completed. The fact that alterations were being made in the presence of the employes was notice to them of the possibility of danger of some sort and of the necessity of exercising great caution." (100)

And in *Sykes v. Packer*, the Supreme Court of Pennsylvania said: (1) "An employer does not impliedly guarantee the absolute safety of his employe. In accepting an employment the latter is assumed to have notice of all patent risks incident thereto, of which he is informed, or of which it is his duty to inform himself. Where, therefore, he undertakes hazardous duties he assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he has had opportunity to ascertain. The master is bound to provide for the safety of his servant to the best judgment. In most cases in which

(98) *Taylor v. Carew Mfg. Co.*, 143 Mass. 470.

(99) *Sweet v. Ohio Coal Co.*, 78 Wis. 127.

(100) *Wannamaker v. Burke*, 111 Pa., 423.

(1) 99 Pa. 465.

danger may be incurred, the servant is as likely to be acquainted with the probability and extent of it, as the master. The latter is, therefore, not responsible for the damages attendant on the mounting of scaffolds, or unfinished staircases, landings or roofs, which the workman has voluntarily undertaken to mount with as much knowledge of the attendant risk as the person who employs him."

But if a carpenter is working on the roof of a building in process of construction he is not bound to inspect the condition of the walls and does not take the risk of the falling of the building in consequence of their insufficiency. (2)

Again, an employe assumes the risks of injury which are incident to his employment; but when one in charge of a carding machine in a cotton mill is injured by falling into an opening in the floor, in a dark passage way, near his machine, of which he had no knowledge, the danger in such a case is an incident to the place of the employment and not to the employment itself. (3)

CHAPTER VII.

ASSUMPTION OF RISKS AFTERWARD DISCOVERED BY CONTINUING IN THE SERVICE.

1. The great rule defining the liability of employers has been radically modified in another direction. Not only may they use such machinery and appliances as they please, however defective, provided their employes know of the defects, or these are so obvious that they ought to know of them at the outset of their service; but employers may also be relieved of liability for defects or imperfections afterward discovered or known by their employes if they continue at their places of service. (4) Thus, an employer hired an incompetent servant, knowingly, indeed, and his incompetency was known by another servant in the same employment, who, nevertheless, continued working with him, and gave no notice of his discovery to his master or to anyone authorized to act for him. Consequently he could recover nothing, though he was afterward injured through the negligence of the incompetent fellow-workman. In other words the servant assumed the new risk, though in fact it was no greater after the discovery than before. This invasion of the rule is in harmony with the invasion already noted, concerning the use of dangerous appliances and working in dangerous places. If a machine is defective the employe need not at

(2) *Giles v. Diamond State Iron Co.*, 8 At. 368 (Del.).

(3) *Hoffman v. Clough*, 124 Pa. 505.

(4) *Huddleston v. Lowell Machine Shop*, 106 Mass. 282.

tempt to manage it; surely, the courts say, he is not obliged to hire himself out under such conditions. In like manner, if it becomes defective and he continues to use it he runs the risk. If he is afraid of injury, he may quit; and the courts say he is justified in doing so. But if he takes his chances, it is his own affair, he runs the risk, and if he is injured he cannot complain. The same infraction of the rule, as we have now seen, applies to working with incompetent employes. (5)

In the case of the United States Rolling Stock Co. v. Wilder, (6) the Supreme Court of Illinois said: "All that the law demands (of an employe) is that he can keep his eyes open to what is passing before him, and to avail himself of such information as he may receive with respect to the habits and characteristics of his fellow-servants, and if from either of these sources of information, he finds one of them, from incompetency or other cause, renders his position exazardous, it is his duty to notify the master, and if the latter refuses to discharge the incompetent or otherwise unfit fellow-servant, the complaining servant will have no other alternative but to quit the master's employ. If he does not, he will be deemed to have assumed the extra hazard of his position thus occasioned."

2. When a servant, knowing that the machinery he is operating is so defective as to render its use dangerous, simply protests against its use, and, after protest, having received no assurance that the defect will be remedied, he continues to use it, the most general rule is that the servant assumes the risk incident to the use of such machinery, for his remaining in the service is voluntary. Protest

(5) Indiana: Rogers v. Leydon, 127 Ind. 50; Rietman v. Stolte, 120 Ind. 314; Indianapolis R. v. Watson, 114 Ind. 20.

Maine: Buzzell v. Laconia Mfg. Co., 48 Me. 113; Wormell v. Maine Central R. Co., 79 Me. 397.

Massachusetts: Hatt v. Nay, 144 Mass. 186.

Michigan: Fort Wayne R. v. Gildersleeve, 33 Mich. 133; Davis v. Detroit R., 20 Mich. 105; Swaboda v. Ward, 40 Mich. 420; Davis v. Detroit R., 20 Mich. 105.

Missouri: McDermott v. Hannibal St. Joseph R., 87 Mo. 285; Alcorn v. Chicago & Alton R., 108 Mo. 81.

New York: Gibson v. Erie Railway Co., 63 N. Y. 449; DeForest v. Jewett, 88 N. Y. 264; Sweeney v. Berlin v. Jones Envelope Co., 101 N. Y. 520; Hickey v. Taafe, 105 N. Y. 26; Williams v. Delaware, Lack. & W. R. Co., 116 N. Y. 628; Davidson v. Cornell, 132 N. Y. 228; Webber v. Piper, 38 Hun. 353.

Pennsylvania: Frazier v. Pennsylvania R., 38 Pa. 104, 111; Schwenk v. Kehler, 122 Pa. 67, 77; Mansfield Coal & Coke Co. v. McEnery, 91 Pa. 185, 194; New York, L. E. & W. R. Co. v. Lyons, 119 Pa. 324, 336; Patterson v. Pittsburg & Connellsville R. Co., 76 Pa. 389, 394.

United States: Tuttle v. Milwaukee R. Co., 122 U. S. 189.

Wisconsin: Haley v. Jump River Lumber Co., 81 Wis. 412; Abbot v. McCadden, 81 Wis. 563; Dorsey v. P. & C. Construction Co., 42 Wis. 583.

(6) 116 Ill. 109.

against, or objection to, a service rendered dangerous by defective machinery if the party making the protest or objection is under no legal obligation to remain in the service, cannot render the service subsequently performed voluntary.

3. Again, though a servant may know of a defect and of the danger, yet if his duties do not ordinarily bring him within the scope of the danger, and he is nevertheless injured by its occurrence, the master is liable. (7)

4. The courts have gone still further. If the appliances used by a workman become defective, or the place wherein he is working becomes more dangerous, in short, if the risk of his employment is increased, and he continues to work as before, whether notifying his employer or not of the increased risk, he assumes it as he did the ordinary risk in the beginning.

5. This rule does not prevail everywhere. In Virginia it is repudiated. In a railroad case the company desired the court to instruct the jury "to the effect that an employer is released from all liability of negligence, although aware of its continued existence, if the injured employe continued to work for him after he knew of the negligent and dangerous manner in which the employer allowed his business to be conducted." The instruction, however, was not given, and it was declared to be "palpably improper. It is sanctioned neither by reason, justice, nor law. The usual and legal duty of every employer is to provide all means and appliances reasonably necessary for the safety of those in his employment. It is a cruel and inhuman doctrine that the employer, though he is aware that his own neglect to furnish the proper safeguard for the lives and limbs of those in his employment puts them in constant hazard of injury, is not to be held accountable to those employes, who, serving him under such circumstances, are injured by his negligent acts and omissions, if the injured parties, after themselves becoming cognizant of the peril occasioned by their employer's negligent way of conducting his business, continue in his employment and receive his pay, though they may be virtually compelled to remain by the stern necessity of earning the daily food essential to keep away starvation itself." (8)

6. When an employe is incompetent or an appliance has become defective, an employe who is liable to suffer must notify his employer of his discovery, otherwise he is regarded as assuming the newly discovered risk. Says the Supreme Court of Kansas: "If an employe knows that another employe is incompetent, or habitually negligent, or that the materials with which he works are defective, and he continues to work without objection, and without

(7) *Sanborn v. Madera Flume & Trading Co.*, 70 Cal. 261.

(8) *Richmond & Danville R. v. Norment*, 84 Va. 167, 173.

being induced by his employer to believe that a change will be made, he will be deemed to have assumed the risk of such incompetency, negligence or defects, and cannot recover for an injury resulting therefrom." (9)

7. When an employer has been notified of the incompetency of a servant, or of a defective appliance, he has a reasonable time to investigate the truth of the notice before acting. He is not required, if a charge, for example, is made of the incompetency of a servant, to discharge him instantly on receiving the notice. Furthermore, he is not liable during the reasonable period given him by law for investigation; to require an employer to act at once or to retain an employe at his peril has been thought harsh, but is not the situation equally harsh for the employe if he is required to assume the risk this incurred without securing any additional compensation, or to retire. This, surely, is a harsh alternative. (10) Says the Supreme Court of Alabama: "The defendant must have had notice—a sufficient time to remedy the defect after its discovery before it could be chargeable with negligence in failing to effect such remedy. Mere knowledge, without the opportunity to act upon it, would not constitute negligence." (11)

8. The notice must be given to the employer or to his representative. It is, therefore, a question for the jury whether an engineer who alone inspects his engine occupies such a relation to the company that notice to him of a defect is notice to the company. This rule was declared by the Supreme Court of Michigan in a case in which it was said "that if the company makes no other provision for inspection and choose to rely upon the reports of its men, deferring repairs until breaks occur, or until the operators, in due course of business, report defects, we must either say that it has neglected the duty of inspection altogether, or that

(9) *Kansas Pacific R. v. Peavey*, 34 Kan. 472, 479; *Kroy v. Railroad*, 32 Iowa 357; *Laning v. New York Central R.*, 49 N. Y. 521; *McQueen v. Railroad*, 30 Kan. 689; *Jackson v. Railroad*, 31 Kan. 761; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Mad River v. Barber*, 5 Ohio St. 541; *United States Rolling Stock Co. v. Wilder*, 116 Ill. 100; *Hatt v. Nay*, 144 Mass. 186; *Lake Shore R. v. Knittal*, 33 Ohio St. 468; *Lucey v. Hannibal Oil Co.*, 129 Mo. 32.

(10) *Indiana: Lake Shore R. v. Steepak*, 108 Ind. 1, s. c. 123 Ind. 210; *Ohio & Miss. R. v. Collarn*, 73 Ind. 261; *Indiana R. v. Dailey*, 110 Ind. 75; *La Rose v. Bank*, 102 Ind. 332.

Maine: *Blake v. Railroad*, 70 Me. 60.

Missouri: *Moss v. Railroad*, 49 Mo. 167.

Kentucky: *McDowell v. Railroad*, 5 S. W. 413.

New York: *Chapman v. Railroad*, 55 N. Y. 579.

Federal: *Ross v. Chicago R.*, 8 Fed. 544.

(11) *U. S. Rolling Stock Co. v. Weir*, 96 Ala. 157; *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143; *Wilson v. Railroad*, 85 Ala. 269; *Indianapolis R. v. Flanagan*, 77 Ill. 365.

it has imposed one of its duties upon its operatives, and that it does not fall within the limits of fellow-service, or that it may avoid the duty which the law imposes by invoking the rule of fellow-servant. So long as operatives do report, and the master repairs promptly, the jury may properly say that there is no negligence on the part of the master; but if defects are not reasonably repaired, the master neglects a duty, and we should not split hairs to determine whether it was his personal carelessness, or that of the agent whom he appoints to apprise him of his impending duty to repair, although such agent is a fellow-operative of one who is injured by reason of a want of seasonable repair." (12)

CHAPTER VIII.

EFFECT OF AN EMPLOYER'S PROMISE TO REPAIR.

1. To the rule last mentioned there is an important modification. If an appliance or place has become defective, or a co-employee has proved himself to be incompetent, and the employer, after the knowledge of this discovery, whether it be that of an employe or his own, promises to repair the defect or provide a competent employe, and other continue to expose themselves to the newly-discovered danger by reason of their master's promise, in most states he is responsible for any injury happening to them afterward springing from the discovered defect, whether it be an appliance, workman, or whatever be its nature. This seems to be a reasonable rule. In such cases an employe does not assume the increased risk. The master virtually says to him, "continue to work, and if you are injured I will bear the loss." (13) It is presumed that the employe would not continue at his post except for his master's promise to lessen or remove the risk. If, therefore, an accident happens to the employe before his employer has acted, or he is negligent in acting, in either case the employer is liable. (14)

2. If, however, the defect be very serious, the employer has been held not to be liable on his promise to repair during even the reasonable period required to make them. This is on the ground

(12) *McDonald v. Michigan Central R.*, 108 Mich. 7, 11; *Brown v. Gilchrist*, 80 Mich. 56; *Johnson v. Spear*, 76 Mich. 139; *Van Dusen v. Letellier*, 78 Mich. 492; *Morton v. Railroad*, 81 Mich. 431; *Dewey v. Railroad*, 97 Mich. 333; *Fuller v. Jewett*, 80 N. Y. 46; *Flike v. Railroad*, 53 N. Y. 549; *Beesley v. Wheeler*, 61 N. W. 659.

(13) *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 586; *Clarke v. Holmes*, 7 H. & N. 937.

(14) *Brownfield v. Hughes*, 128 Pa. 194; *Swaboda v. Ward*, 40 Mich. 420; *Sherman v. Chicago R.*, 34 Minn. 359.

that the employe ought not to have assumed the risk anyhow; that he was unwise in so doing and ought to be punished by shutting off all chance of recovery. This is not the rule everywhere. The distinction has thus been stated in one of the cases: "When the servant, in obedience to the requirements of the master, incurs the risk of machinery, which, though dangerous, is not so much as to threaten immediate injury, or where it is probable it may be safely used by extraordinary caution and skill, the risk is one not assumed. On the other hand, if the defect was so great, the danger was so imminent, so much so that none but a reckless man would incur it, the employer would not be liable." (15) But some courts do not accept this doctrine.

3. "The promise must be by the master or his representative." Thus remarked the court in *Ehmcke v. Porter*. (16) "A master may intrust to another the performance of the duty he owes to his servants to exercise care in providing them a safe place in which, and safe instrumentalities with which, to do their work; and when he has done so, a promise to a servant by such other to remedy the dangerous condition of things is equivalent to a promise by the master himself."

4. If the employer promises to repair the defect, the employe "can recover for an injury caused thereby within such period of time after the promise as it would be reasonable to allow for its performance, and, as we think for an injury suffered within any period which would not preclude all reasonable expectations that the promise might be kept." This statement of the rule was made by the Supreme Court of the United States and everywhere prevails. This promise removes all ground for holding that the employe assumes the enlarged risk. (17)

(15) *Patterson v. Railroad*, 76 Pa. 389; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Hough v. Railroad*, 100 U. S. 213; *Loonam v. Brockway*, 3 Rob. (N. Y.) 74; *Illinois Central R. v. Jewell*, 46 Ill. 99; *Crichton v. Keir*, 1 C. Ses. Cas. (3d Series) 407; *Indianapolis R. v. Watson*, 114 Ind. 20, 32.

(16) 45 Minn. 338.

(17) *Illinois: Mo. Furnace Co. v. Abend*, 107 Ill. 44.

Indiana: Indianapolis R. v. Watson, 114 Ind. 20.

Iowa: Greenleaf v. Railroad, 33 Iowa 52; *Kroy v. Railroad*, 32 Iowa 357.

Michigan: Lyttle v. Railroad, 84 Mich. 289; *Marquette R. v. Spear*, 44 Mich. 169.

Minnesota: LeClair v. Railroad, 20 Minn. 9; *Greene v. Railroad*, 31 Minn. 248.

Missouri: Conroy v. Vulcan Iron Works, 62 Mo. 35.

New York: Laning v. Railroad Co., 49 N. Y. 521; *Marsh v. Chickering*, 101 N. L. 396; *Hawley v. Railroad*, 82 N. Y. 370.

Ohio: Union Mfg. Co. v. Morrissey, 40 Ohio St. 150.

Pennsylvania: Patterson v. Railroad, 76 Pa. 389.

Wisconsin: Stephenson v. Duncan, 73 Wis. 407; *Corcoran v. Milwaukee Gas-light Co.*, 81 Wis. 194.

United States: Hough v. Railway Co., 100 U. S. 213.

What is a promise to repair? It has been declared that when employes complain of an impending peril in a position to which they have been ordered, and they notify their employer of the danger, and ask to be relieved, he cannot refuse to relieve them, insist on their continuing to work in that position, and, as they remain at his discretion, waiting for an inspection which he has promised but neglects to make, relying on his promise and superior judgment, and fearing the consequences of disobedience, and are injured, be then allowed to say, "You were guilty of contributory negligence in doing what I directed you to do," or "you assumed that risk when you entered my employment." Under such circumstances, employes cannot be said to have either heedlessly or voluntarily assumed the risk. (18)

5. After a reasonable time for making the repairs has passed, and they are not made, the employe is deemed to have waived his objection and assumed the still greater risk that has actually arisen or come to his knowledge. (19) This rule does not prevail in all the states. Says the Supreme Court of Missouri: "The rule is too well settled in this state to require the citation of cases, that a person when he enters the service of another assumes all the risks and dangers usually incident to the employment in which he engages. But the rule is equally well settled that the employer is charged with the duty of not subjecting his servants to risk by his own negligence. Under this rule he is required to use ordinary care, not only in providing sound and secure instrumentalities which they are required to employ in their work, but in keeping them in such condition. This is a continuing duty of the master, and a neglect of it is negligence. On entering the employment the servant does not assume the risk of dangers arising from its neglect. It is claimed that though the duty to repair defects is neglected by the master, if the servant is advised of its and thereafter elects to continue in the service and to use the defective means, he thereby assumes the risk therefrom. The rule thus invoked would relieve the master of his duty, as soon as the servant became aware of its violation.

"Such, however, is not the law of this State. The duty to repair is a continuing one, and a failure to discharge it is negligence, though the servant may continue in the service after knowledge thereof. An expressed contract will not relieve him." (20)

(18) *Schlacker v. Ashland Iron Mining Co.* 89 Mich., 253, 262. If a master promise to remove an incompetent servant, a fellow- or so-servant may remain for a time in his service without being chargeable with contributory negligence: *Lyberg v. Northern Pacific R.*, 39 Minn. 15.

(19) *Stephen v. Duncan*, 73 Wis. 407; *Davis v. Graham*, 2 Colo. App. 210).

(20) *Settle v. St. Louis R.*, 127 Mo. 336.

6. Whether the servant has waived the neglect of the master and assumed the risk of the promise to repair is a question for the jury. Though the promise may have been given under such conditions, the question of waiver of performance may be one of law for the court. (21)

7. There is another exception to the efficiency of the employer's promise to repair. (22) We have seen that there are cases in which employers are not required to make any inspection of the tools used by their servants for the reason that the latter know as much or more about their condition than their masters. This rule applies to the small tools used by farmers, axes, ladders, chains and the like. In such cases if a defect appears and the servant notifies his master and asks for another instrument, and he promises "to furnish the same, in such a case, the promise does not render the master responsible if the accident occurs." Why this exception should be made to the validity of the master's promise is not stated. Nor can we discover any reason why it should be made. Simply because the danger from using it may be less or less serious, is no reason for absolving the master.

8. This, then, is the other remnant left of the great principle that first determined the duties of an employer. If an appliance of his becomes defective or dangerous to use, and he promises the user that he will repair it if he will continue to work, he is holden for the consequences. The law does not regard the laborer as taking the assumed risk, but rather as determined to quit if this assurance is not given to him. Even this exception, as we have seen, does not exist in some states, for if repairs are not made in a reasonable time, the law regards the employer as having changed his mind, with the right to do so; consequently, if an employe continues to work beyond the reasonable time and no repairs are made, he is regarded as assuming the greater risk. In these states, therefore, only a mere fragment is left of the great rule which has been stalking in an ever vanishing form around the courts.

CHAPTER IX.

WHO ARE FELLOW-SERVANTS?

1. That the rule established in *Priestley v. Fowler* would lead to unending litigation was inevitable, for who are to be regarded as

(21) *Laning v. Railroad*, 49 N. Y. 521; *Hawley v. Railroad*, 82 N. Y. 370; *Stephenson v. Duncan*, 73 Wis. 407; *Union Mfg. Co. v. Morrissey*, 44 Ohio St. 150; *Mo. Furnace Co. v. Abend*, 107 Ill. 44; *Patterson v. Railroad*, 76 Pa. 389; *Hough v. Railway Co.*, 100 U. S. 213; *Lewis v. Railroad*, 153 Mass. 76.

(22) *Marsh v. Chickering*, 101 N. Y. 396, 400.

fellow-servants, and who not? A double question was soon raised; how closely must employes of the same common employer be associated to establish between them the relation of fellow-service was one of them; and between what relation in the rank of employment were employes to be regarded as fellow-servants was the other. There can be no question between two men, for example, who are hewing stones for a common employer that they are fellow-servants, but are they fellow-servants with others who are engaged in hauling stone to the place of hewing, or fellow-servants with the quarrymen? Thousands of such questions have arisen under this famous rule.

Again, is a foreman or superintendent of men to be regarded as one of them, or as an agent or representative of his employer? If he is a fellow-servant, then his employer cannot be held for the consequences of his negligence; if, on the other hand, he is an agent or superior, his employer is as responsible as though the negligent act was done by himself.

What rules or distinctions have been established to determine when an employe is simply an employe, and when he is an agent? And we may remark by way of answer that while several have been set up, not a rule has yet been found to mark off clearly the relationship between employers and employes that has won universal adoption. Some states have set up one rule, some another; others have wobbled and after establishing a rule and discovering how difficult it was to apply it, have set up another.

In a recent deliverance Justice Magie said: "There are doubtless many cases where it will be difficult to draw the line between the employe who represents his employer, and the workman who stands on the footing of a common employment with his fellow-workmen. To attempt to explore the adjudged cases on this subject is to bewilder one's self in a maze of decisions inconsistent with each other and often irreconcilable with the principles at the foundation of the liability of the master to the servant." (23)

Why is there such a maze of decisions? Is not the reason obvious, even to the blindest, because the great rule of duty or liability is irrational, unworkable. Courts have been continually differing in applying it, not because they wished to differ, but because the rule is imperfect. Courts have been both honest and intelligent, and have sought to build up a harmonious system of law, but the rule has defied their best efforts. This is the plain truth; has not the fulness of time come, therefore, after this long and fruitless march on the costly judicial road, to adopt another rule more consonant with reason and less difficult in its application?

2. We may start out with the unquestioned rule that, when a master

(23) *Rogers Locomotive Works v. Hand*, 50 N. J. Law. 466.

delegates to another the performance of a duty which rests absolutely on himself to perform, the master is liable for the manner in which the duty is executed. (24) The employe's rank, whether he is above or on the same level as that of other employes, does not affect the master's liability. Says the Supreme Court of Colorado: "The accepted general rule is that where the negligent agent or servant can fairly be said to take the place of the master, and represent him so as to become in reality a vice-principal, and the negligence occurs in the discharge of his representative duties, the master's liability may attach. But the difficulty arises in determining what power and duties constitute a vice-principal in each particular case. This is where the divergence among the more modern and better considered cases begins. It is asserted that one is a vice-principal to whom the master deposes the power of appointment and dismissal. But while the power of appointment and dismissal is undoubtedly an attribute of the master, its possession alone is, by other authorities, declared not to be always decisive." (25)

This rule has been tersely stated by the Supreme Court of Michigan in these words: "If the act (be one) that the law imposes the duty upon the part of the master to perform, then the offending employe is not a fellow-servant, but a superior or agent, for who acts the master is held liable." (26)

(24) *Lindvall v. Woods*, 41 Minn. 216; *Dwyer v. American Express Co.*, 82 Wis. 307; *Sullivan v. New York R.*, 622 Conn. 215.

(25) *Colorado Midland R. v. Naylor*, 17 Colo. 501.

(26) *United States: Randall v. Baltimore & Ohio R.*, 109 U. S. 483; *Northern Pacific R. v. Herbert*, 116 U. S. 647; *Northern Pacific R. v. Peterson*, 162 U. S. 346.

Arkansas: *Fones v. Phillips*, 39 Ark. 17; *St. Louis R. v. Harper*, 44 Ark. 524.

California: *Ryan v. Los Angeles Ice Co.*, 112 Cal. 244; *Davies v. Southern Pacific R.*, 98 Cal. 19.

Colorado: *Denver R. v. Driscoll*, 12 Colo. 520; *Colo. Midland R. v. O'Brien*, 16 Colo. 219.

Connecticut: *Gerrish v. New Haven Ice Co.*, 63 Conn. 9.

Georgia: *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726.

Illinois: *Chicago R. v. Kneirim*, 152 Ill. 458; *Mobile R. v. Godfrey*, 155 Ill. 78.

Indiana: *Taylor v. Evansville R.*, 121 Ind. 124; *Louisville R. v. Miller*, 140 Ind. 685.

Kansas: *Kansas Pacific R. v. Salmon*, 14 Kan. 512; *Cherokee Coal Co. v. Britton*, 3 Kan. App. 292.

Maine: *Donnelly v. Booth Brothers*, 90 Me. 110.

Iowa: *Fosburg v. Phillips Fuel Co.*, 93 Iowa 54.

Maryland: *State v. Malster*, 57 Md. 287.

Massachusetts: *Kelley v. Norcross*, 121 Mass. 508; *Moynihan v. Hills Co.*, 146 Mass. 586.

Michigan: *Brown v. Gilchrist*, 80 Mich. 409; *Harrison v. Detroit R.*, 79 Mich. 409; *Palmer v. Michigan Central R.*, 93 Mich. 363.

3. The second rule is quite as clear, that a person who represents his master fully, taking charge of his entire business so far as his employer is concerned, is not, under any circumstances, a fellow-servant with those employed by him. Says Chief Justice Ruger: "When the general management and control of an industrial enterprise or establishment is delegated to a superintendent with power to hire and discharge servants, to direct their labors and employ suitable means and appliances for the conduct of the business, such superintendent stands in the place of the master, and his neglect to adopt all reasonable means and precautions to provide for the safety of the employes constitutes an omission of duty on the part of the master, rendering him liable for any injury to the servant therefrom." (27)

The Supreme Court of Indiana, speaking through Justice Woods, has said: "A general agent employed to represent the master in his absence and charged with the duties which it would be incumbent on the master to perform, if he were present, is not a mere fellow-servant, whose negligence can impose no liability upon the master, to an injured subordinate. The owner of mills or ma-

Minnesota: Tierney v. Minneapolis R., 33 Minn. 311.

Missouri: Higgins v. Mo. Pacific R., 43 Mo. App. 547; Dayharsh v. Hannibal & St. Joseph R., 103 Mo. 570; Coontz v. Mo. Pacific R., 121 Mo. 652.

New Jersey: Maher v. Thropp, 59 N. J. Law 186.

New York: Flike v. Boston & Albany R., 53 N. Y. 549; Hankins v. New York R., 142 N. Y. 416; Stringham v. Stewart, 100 N. Y. 516.

North Dakota: Ell. v. Northern Pacific R., 1 N. Dak. 336.

Oregon: Anderson v. Bennett, 16 Ore. 515; Miller v. Southern Pacific R., 20 Ore., 285.

Pennsylvania: Lewis v. Seifert, 116 Pa. 628; Ross v. Walker, 139 Pa. 42.

Rhode Island: Mulvey v. R. I. Locomotive Works, 14 R. I. 204; Brodeur v. Valley Falls Co., 16 R. I. 448.

South Carolina: Gunter v. Graniteville Mfg. Co., 18 S. Car. 262; Wilson v. Charleston R., 51 S. C. 79.

Texas: Texas R. v. Whitmore, 58 Texas 276; San Antonio R. v. Adams, 6 Tex. Civ. App. 102.

Utah: Chapman v. Southern Pacific R., 12 Utah 30.

Virginia: Moon v. Richmond R., 78 Va. 745; Torian v. Richmond R., 84 Va. 192.

Vermont: Davis v. Central Vt. R., 55 Vt. 84.

Washington: Ogle v. Jones, 16 Wash. 319.

Wisconsin: Brabbitts v. Chicago R., 38 Wis., 289; Johnson v. Ashland First Nat. Bank, 79 Wis. 414.

(27) Indiana: Mitchell v. Robinson, 80 Ind. 281; Indiana Car Co. v. Parker, 101 Ind. 181; Krueger v. Railroad, 111 Ind. 51; Pennsylvania Co. v. Whitecomb, 111 Ind. 212.

Kansas: Kansas Pacific R. v. Little, 19 Kan. 267.

New York: Pantzar v. Tilly Foster Iron Mining Co., 99 N. Y. 368, 372; Corcoran v. Holbrook, 59 N. Y. 517.

Pennsylvania: Ross v. Walker, 139 Pa. 42, 49; New York R. v. Bell, 112 Pa. 400; Lewis v. Seifert, 116 Pa. 628; Prescott v. Ball Engine Co., 176 Pa. 459.

chinery, which men are employed to operate, owes duties to the employes which he cannot escape by absenting himself and committing the entire charge to an agent." (28) And in another case the same court remarked: "Whoever is appointed or permitted to discharge duties which pertain to the station or function of employer must, upon the plainest principles of reasoned justice, be held to stand as the representative of the employer, and, in case injury results from this neglect, the latter must answer for his delinquency." (29)

Likewise, in Maryland, it is declared that if a master leaves everything to another, then he is a vice principal. (30) "Where the middle man, or superintendent, is entrusted with the discharge of the duties incumbent upon the master, as between the latter and the servants, then the master may be liable for the omissions or neglect of the manager or superintendent in respect to those duties. If the master relinquishes all supervision of the work, and entrusts not only the supervision and direction of the work, but the selection and employment of the laborers, and the procuring of materials, machinery and other instrumentalities necessary for the service, to the judgment and direction of a manager or superintendent, in such case the latter becomes a vice-principal, and for his omissions or negligence in the discharge of those duties, the principal will be liable." (31)

The rule has been well expressed by Justice Mitchell: "A vice-principal for whose negligence an employer will be liable to other employes must be either, first, one in whom the employer has placed the entire charge of the business, or of a distinct branch of it, giving him not mere authority to superintend certain work or certain workmen but control of the business, and exercising no discretion or oversight of his own; or, secondly, one to whom he delegates a duty of his own which is a direct, personal and absolute obligation from which nothing but performance can relieve him." (32)

4. The third rule pertains to corporations. "The directors, president and superintendent of a company are not fellow-servants. Perhaps other officers may be included, but these certainly are not fellow-employes." Says Justice Brewer: (33) "The directors are the managing agents; their negligence must be adjudged the negligence of the corporation, although they are simply agents. So, when

(28) *Mitchell v. Robinson*, 80 Ind. 281; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Krueger v. Railroad*, 111 Ind. 51; *Pennsylvania Co. v. Whitecomb*, 111 Ind. 212.

(29) *Cincinnati R. v. McMullen*, 117 Ind. 439, 444.

(30) *State v. Malster*, 57 Md. 308.

(31) *Murphy v. Smith*, 19 C. B. (N. S.) 361; *Malone v. Hathaway*, 64 N. Y. 5.

(32) *Prevost v. Citizens' Ice Co.*, 185 Pa. 617, 621.

(33) *Baltimore & Ohio R. v. Baugh*, 149 U. S. 382.

they place the entire management of the corporation in the hands of a general superintendent, such general superintendent, though himself only an agent, is almost universally recognized as the representative of the corporation, the master, and his negligence as that of the master. And it is only carrying the same principle a little further and with reasonable application, when it is held that if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employes under them, vice-principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent." (34) The same court also incorporate into its opinion the following rule established by the New York Court of Appeals: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employes, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and, within the limits of the delegated authority, the acting principal." (35)

5. The fourth rule is, a person to whom the principal delegates the duties for the performance of which he is absolutely responsible, is not a fellow-servant. These duties, as we have seen, are that an employer must exercise due and ordinary care (1) in selecting suitable and competent servants; (2) in furnishing them with suitable materials and machinery and appliances for their task; (3) in keeping the machinery and appliances in suitable repair; (4) in providing safe places for working; (5) in furnishing adequate assistance to do the work desired; and (6) lastly, in giving proper regulations or instructions to youthful or inexperienced workmen. A person, therefore, who performs these duties for his employer represents him in so doing, and the employer is responsible therefor. This rule is the law everywhere, except the clauses relating to adequate assistance and to the keeping of appliances and machinery

(34) See remarks by Fletcher, J., *King v. Boston & Worcester R.*, 9 Cush. 112.

(35) *Malone v. Hathaway*, 64 N. Y. 5, 12.

in suitable repair. The exceptions are chiefly in Massachusetts, and will be considered before concluding this chapter. (36)

a. Each of these duties may be briefly considered. First, the duty of an employer to select suitable appliances and machinery. This is a primary duty, and the employer's responsibility for doing it cannot be shifted or evaded by delegating its performance to another. The decisions are in accord concerning the rule, however much they may differ in applying it. Whether machinery and appliances are suitable for the purposes intended is a question purely

(36) United States: *Hough v. Texas R.*, 100 U. S. 213; *Great Northern R. v. McLaughlin*, 44 U. S. App. 189.

California: *Hallower v. Henley*, 6 Cal. 209; *Beeson v. Green Mt. Mining Co.*, 57 Cal. 20; *Trask v. Cal. Southern R.*, 63 Cal. 95; *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417.

Colorado: *Wells v. Coe*, 9 Colo. 159; *Denver R. v. Sipes*, 26 Colo. 17, 1899.

Delaware: *Foster v. Pusey*, 8 Houston 168.

Georgia: *Savanah R. v. Goss*, 80 Ga. 524.

Illinois: *Chicago R. v. Avery*, 109 Ill. 314; *Leonard v. Kinnare*, 174 Ill. 532; *Hines Lumber Co. v. Ligas*, 68 Ill. App. 523.

Indiana: *Mitchell v. Robinson*, 80 Ind. 281; *Indiana Car Co. v. Parker*, 100 Ind. 187; *Indiana R. v. Snyder*, 140 Ind. 647.

Kansas: *Atchison R. v. Moore*, 29 Kan. 632; *Atchison R. v. McKee*, 37 Kan. 592; *Rouse v. Downs*, 5 Kan. App. 549.

Maine: *Sahuny v. Androscoggin Mills*, 66 Me. 420; *Donnelly v. Booth Brothers*, 90 Me. 110.

Maryland: *Cumberland R. v. State*, 44 Md. 283.

Massachusetts: *Snow v. Housatonic R.*, 8 Allen 441; *Moynihan v. Hills Co.*, 146 Mass. 586; *Killea v. Faxon*, 125 Mass. 485.

Michigan: *Thomas v. Ann Arbor R.*, 114 Mich. 59.

Minnesota: *Kelly v. Erie Tel. Co.*, 34 Minn. 321; *Blomquist v. Chicago R.*, 60 Minn. 426.

Mississippi: *Memphis R. v. Thomas*, 51 Mass. 637.

Missouri: *Gibson v. Pacific R.*, 46 Mo. 163; *Whalen v. Centenary Church*, 62 Mo. 326; *Covey v. Hannibal & St. Joseph R.*, 86 Mo. 635.

Nebraska: *Sioux City R. v. Finlayson*, 16 Neb. 578.

North Carolina: *Cowler v. Richmond R.*, 84 N. Car. 309.

New Jersey: *Smith v. Oxford Iron Co.*, 42 N. J. Law 467; *Maher v. Thropp*, 59 N. J. Law 186; *Comben v. Belleville Stone Co.*, 59 N. J. Law 226.

New York: *Bushby v. New York R.*, 107 N. Y. 374; *Stringham v. Stewart*, 100 N. Y. 516; *Tomaselli v. Griffiths Cycle Corp.*, 9 N. Y. App. Div. 127.

Pennsylvania: *O'Donnell v. Allegheny Valley R.*, 59 Pa. 239; *Ardesco Oil Co. v. Gibson*, 63 Pa. 146; *Phila. R. v. Keenan*, 103 Pa. 124.

Rhode Island: *Mulvey v. R. I. Locomotive Works*, 14 R. I. 204.

Texas: *Houston R. v. Marcelles*, 59 Texas 334; *Houston R. v. Rider*, 62 Texas 267; *Terrell Compilers Co. v. Arrington*, Civ. App. 48 S. W., 1898, 59.

Utah: *Bossers v. Union Pacific R.*, 4 Utah 215; *Cunningham v. Union Pacific R.*, 4 Utah 206.

Vermont: *Davis v. Central Vt.*, 55 Vt. 84; *Nyes v. Smith*, 28 Vt. 59; *Houston v. Brusk*, 66 Vt. 331.

Washington: *Ogle v. Jones*, 16 Wash. 319.

Wisconsin: *Schultz v. Chicago R.*, 48 Wis. 375; *Peschel v. Chicago R.*, 62 Wis. 338.

of fact, and a question, too, in which precedents often count for little, and rightly, because they are so rarely in every respect the same.

In applying this rule the Supreme Court of Indiana has remarked: "When the premise is conceded that the duty to furnish reasonably safe and proper instrumentalities for the performance of the work rests upon the employer, the conclusion logically follows that the consequences of a negligent failure to perform that duty must, no matter to whom it may have been committed, be visited upon the employer, and not upon the employe, who suffered injury therefrom." (37) Adopting for the most part the language of the court of another state, the same court on another occasion said: "It is undoubtedly the duty of the employer to provide the employe with a safe working place and safe machinery and appliances. This duty is one which the law enjoins upon the master, and is one which cannot be so delegated as to relieve him from responsibility. The agent to whom it is entrusted, whatever his rank may be, acts as his master in discharging it. He is in the master's place." (38)

It will be noticed that the entire duties of the employer are not stated as an essential to constitute one to whom he has delegated his duty, or appointed to act for him, as a vice-principal. Nor must a person be clothed with authority to do all these things to constitute him a vice-principal. Evidently, in Indiana, if he is appointed to perform any one of the clear unquestioned duties of the master, he represents him in doing it and the master is responsible for his act. In that state it is the duty of the master to keep appliances, etc., in repair. This is held to be, and logically is, just as important as to furnish them in the beginning; therefore, the master is liable for the negligence of a car inspector the same as though the master had made the inspection himself. A section foreman, therefore, who can employ and discharge section hands is a vice-principal. (39)

Likewise, in Massachusetts, the Supreme Court has remarked, in the case of *Lawless against a railroad*: (40) "It was the duty of the defendant to furnish a locomotive engine suitable for the work which it required the plaintiff to perform with it, and to exercise ordinary care in the performance of this duty; and it was respon-

(37) *Cincinnati R. v. McMullen*, 117 Ind. 439, 444; *Bushby v. New York R.*, 107 N. Y. 374; *Fox v. Minneapolis R.*, 30 Minn. 231; *Macy v. St. Paul R.*, 35 Minn. 200; *Condon v. Missouri Pacific R.*, 78 Mo. 567; *Missouri R. v. Dwyer*, 36 Kan. 58; *King v. Ohio R.*, 8 Am. & Eng. R. Cases, 119; *Braun v. Chicago R.*, 53 Iowa 595.

(38) *Louisville R. v. Graham*, 124 Ind. 89; *Taylor v. Railroad*, 121 Ind. 124; *Hoosier Stone Co. v. McCain*, 133 Ind. 231; *Noll v. Railroad*, 129 Ind. 260.

(39) *Justice v. Pennsylvania Co.*, 130 Ind. 321.

(40) 136 Mass. 1.

sible to the plaintiff, if he was using due care, for an injury resulting from its negligence and want of ordinary care in this respect. It did not necessarily discharge this duty by entrusting it to suitable servants and agents, but was responsible for the negligence or want of ordinary care of such servants in the performance of the duty, were not fellow-servants of the plaintiff, but were charged with the duty required of the defendant." (41)

b. The duty to furnish a safe place for work is equally primary; therefore, an agent who performs this duty for his master is not a fellow-servant. Says Justice Cartwright: "The duty to exercise reasonable care to see that the place furnished for a servant to work is reasonably safe is a positive obligation towards the servant, and the master is responsible for any failure to discharge that duty, whether he undertakes its performance personally or through another servant. The master cannot divest himself of such duty, and he is responsible as for his own personal negligence for a want of proper caution on the part of his agent." (42)

c. The duty to select competent employees is equally a primary one, the responsibility for which cannot by any other delegation of its performance be evaded. This is the universal rule. In one of the well-known cases the Supreme Court of Michigan has said: "This duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation, and if it becomes necessary to entrust its performance to a general manager, foreman or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risk of his negligence. The same is true of the general supervision of his business; if there is negligence in this, the master is responsible for it; whether the supervision be by the master in person or by some manager, superintendent or foreman to whom he delegated it. In other words, while the servant assumes the risk of the negligence of fellow-servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to entrust his superintending authority." (43)

d. The clause requiring employers to keep their appliances and machinery in repair is perhaps in every state except Massachusetts just as imperative on them as to furnish suitable appliances in the beginning. Of course, the obvious limitation is, such repairs as must be made by some other person than the user or operator

(41) *Moynihan v. Hills Co.*, 146 Mass. 586.

(42) *Hess v. Rosenthal*, 160 Ill. 621; *Chicago R. v. Swett*, 45 Ill. 197; *Chicago R. v. Jackson*, 55 Ill. 492; *Mobile & Ohio R. v. Godfrey*, 155 Ill. 78.

(43) *Quincy Mining Co. v. Kitts*, 42 Mich. 39; citing *Albro v. Agwam Canal Co.*, 6 Cush. 75; *McAndrews v. Burns*, 34 N. J. Law 117; *Malone v. Hathaway*, 64 N. Y. 9; *Hard v. Vermont R.*, 32 Vt. 473.

of the appliance or machine. Consequently, they cannot throw off or lessen their liability by delegating this duty to others. Says Justice Mitchell: "An employer is required not only to furnish reasonably safe and suitable tools and machinery, but by exercising such a continuing supervision over them, by such reasonably careful and skilful inspection and repair as will keep the implements which employes are required to use in such a condition as not unnecessarily to expose them to unknown and extraordinary hazards." (44)

Likewise the Supreme Court of Colorado (45) has declared that "agents charged with the duty of procuring safe machinery, or agents charged with the duty of inspecting and keeping machinery and appliances in suitable repair are not to be regarded as fellow-servants with those employed to labor in the business wherein such machinery or appliances are used, or, in some cases, even with those engaged to operate the same. The master is liable for injuries resulting without contributory negligence, to other servants, through the ordinary negligence of his employe or agents thus charged with the duty of procuring or repairing whether such negligence be in originally failing to purchase safe machinery or appliances, or in failing to keep the same in proper condition for use."

And more recently the same court has said that "it is the duty of an employer to make reasonable efforts to keep machinery and appliances used by his employes in suitable condition for use. This is one of the duties which he is bound to perform, and cannot be delegated, so as to exonerate him from liability to an employe injured by the negligence of a co-employe charged of such duty, in failing to do so; for the employe so charged is the representative of the employer, and not a co-servant with the one who sustains an injury by the negligent performance of such duty, and the act or omission of the employer in this respect is that of the employer, irrespective of the grade of the employe whose negligence caused the injury." (46)

It certainly is very illogical to hold that a person who selects a machine for an employer is not a fellow-servant with him who is to use it, and also to hold that when the machine becomes defective and a person is assigned to repair it and make it again fit for use that the repairer should be regarded as the fellow-servant of the person who is to use it, for the duty to make the machine fit is just as imperative as the duty to provide a fit machine in the beginning.

In every state, perhaps, except Massachusetts, the duty of repair

(44) *Cincinnati R. v. McMullen*, 117 Ind. 443; *Louisville R. v. Buck*, 116 Ind. 566.

(45) *Wells v. Coe*, 9 Colo. 159.

(46) *Denver & Rio Grande R. v. Sipes*, 26 Colo. 17, 23.

is as much the employer's duty as that of furnishing proper appliances in the beginning. Consequently the persons who represent the master in making repairs are not fellow-servants with those who use the machinery. (47) Says the Supreme Court of Maine: "Those who are employed in the furnishing or repair of machinery and appliances are not fellow-servants of those who are employed in their use. To provide machinery and keep it in repair, and to use it for the purpose intended are very distinct matters. They are not employments in the same common business tending to the same common result. The one may properly be said to begin only when the other ends." (48)

e. Though the duty to repair is regarded as the employer's duty which cannot be delegated, except as above mentioned, yet, in applying this rule the courts are not in harmony concerning the position of an inspector. Most of them regard him as doing the work of his employer the same as a supplier or repairer of appliances. Thus, in *Tierney v. Minneapolis & St. Louis R.*, (49) the Supreme Court of Minnesota says: "If it is the duty of the corporation to exercise reasonable diligence to supply suitable and safe instrumentalities for the use of its servants to work with, it is also its duty to use like diligence to keep the same in proper repair. This necessarily involves inspection and examination as incident to the obligation to repair, and, as a corporation must necessarily act through agents, the negligence of its employes in the discharge of such a duty is attributable to the corporation."

Another application of this rule was made to a foreman engaged in repairing a railroad track. This was one of the instrumentalities of the road, which it was the duty of the corporation to keep in repair. When it entrusted the performance of this duty to a servant or agent he occupied the place of the corporation itself, and for his negligence the corporation was responsible. It was, therefore, liable to a man who, while working under him, was injured by the foreman's negligence. (50) By the logical application of this rule brakemen and car inspectors are not fellow-servants. (51)

In Michigan it was held at first that an inspector and brakeman were fellow-servants, the court declaring that it was not a duty of management or general supervision, but a task for which nothing was required but fidelity and mechanical knowledge of a comparatively limited kind. It was such work as would seldom be delegated to an officer of extensive responsibility who had other

(47) *Roax v. Lumber Co.*, 49 Mich. 60.

(48) *Shanny v. Androscoggin Mills*, 66 Me. 426.

(49) 33 Minn. 311.

(50) *Drymala v. Thompson*, 26 Minn. 40.

(51) *Fox v. Railroad*, 30 Minn. 231; *Moey v. Railroad*, 35 Minn. 200.

interests to look after. (52) At a later period, however, the court changed the rule and held that a car inspector was not a fellow-servant with a brakeman, (53) nor was a train dispatcher (54) nor an inspector of machinery a fellow-servant with the employes. (55)

This rule has been applied in Texas. One of the cases was that of an engineer and fireman. The latter was injured by the parting of the engine from the tender. If it had been properly inspected the accident would not have happened, and the duty of inspection or examination was the employer's. It was delegated to the engineer who thus acted in a double capacity. The company was declared to be none the less liable. "Whatever negligence," said the court, "there may have been shown on the part of the engineer was the failure to inspect the engine and see that the coupling was in a safe condition, and as this was the duty of the defendant, the failure of the engineer to properly inspect would be the negligence of the defendant, and not of the engineer, a fellow-servant." (56)

This rule is in force in New York. Said Chief Justice Andrews, in *Bailey v. Rome & Watertown*: (57) "The duty of a railroad company to use reasonable care to protect its employes from injury while engaged upon its trains, embraces the objection to use reasonable care in furnishing suitable machinery in the first instance, and to keep it in repair so that their lives may not be exposed to unnecessary peril. The duty of proper inspection for the purpose of discovering defects which may arise from use is a part of the duty owing by the company to its servants." Inspectors, therefore, are not fellow-servants with the other employes of a company. Another application of the same principle has been made to train dispatchers. It is true that in one of the cases the lower court decided they were fellow-servants with those around them, but the Court of Appeals decided otherwise. (58)

The highest federal court regards a railroad inspector as a representative of his own company to inspect its cars, but he is a fellow-servant with a brakeman in inspecting foreign cars. (59) This is another application of the New York rule that the same person may act in two different capacities at the same time; he may represent his employer in directing men and render him responsible therefor, he may at the same moment act like a common workman, and in thus acting be negligent injure some one yet

(52) *Smith v. Potter*, 46 Mich. 258.

(53) *Morton v. Railroad*, 81 Mich. 423.

(54) *Hunn v. Railroad*, 78 Mich. 513.

(55) *Van Dunn v. Letellier*, 78 Mich. 492.

(56) *Sabine & East Texas R. v. Ewing*, 1 Texas Civ. App. 531; *International & Gulf R. v. Ryan*, 82 Texas 565; *Gulf R. v. Wells*, 16 S. W. 1025.

(57) 139 N. Y. 302, 305.

(58) *Flike v. Boston & Albany R.*, 53 N. Y. 549.

(59) *Northern Pacific R. v. Herbert*, 116 U. S. 642.

not inculcating his employer by the act, for this is done not representatively, but personally. Now, we perceive in the case of a car inspector the full beauty of the principle. In inspecting those of his own company he represents his master; in inspecting foreign cars he is acting as a fellow-servant with those around him. Trains are often composed of cars of varied ownership. An inspector does some negligent act in connection with the coupling of two cars, one belonging to his own company, the other to another company. In what capacity is the inspector acting in this transaction, as a representative or fellow-servant? To such an absurdity does this subtle distinction at last come? What a travesty on the law is the invention of such a rule for determining relations that ought to be so clear that ordinary men can understand them.

f. That a train dispatcher represents his employer has been the uniform answer given by all the courts. Said the court in one of these cases: (60) "The rule, we think, does not sufficiently recognize the distinction between agents, managers and even superintendents, on the one hand, and mere servants and common laborers on the other, between duties which the master is required to perform and work which is ordinarily performed by employes. It makes little allowance for emergencies, and does not sufficiently regard the obvious fact that cases are constantly arising, especially in the operation of railroads, which no general rule can provide for, in which the master must be regarded as constructively present, and in which some one must be invested with a discretion and a right to speak and command in his name and by his authority. Such a right carries with it the corresponding duty of obedience; some one must hear and obey. To make no discrimination, but in all cases to please those who are invested with authority to direct and control on the same footing with those whose duty it is to merely perform as directed without discretion and with no responsibility, seems to us unwise and impolitic."

g. Lastly may be mentioned that part of the rule relating to instructions. The duty of giving these can in no wise be so delegated to another as to release the employer and transform the agent into a fellow servant. This rule has recently been again declared and applied by the Court of Errors and Appeals of New Jersey. (61)

6. Passing to the fifth rule, it may be briefly stated thus: An individual may serve as employe in the double capacity of vice-principal and mere employe at the same time. There is nothing inconsistent in regarding him as serving in a double capacity or function. Thus, in *McElliott v. Randolph*, (62) the court remarks:

(60) *Darrigan v. New York & New Eng. R.*, 52 Conn. 285, 305.

(61) *Addicks v. Christolph*, 62 N. J. Law, 786.

(62) 61 Conn. 157, 164.

"One may in some of his act be executing his master's duty towards the master's interests, while in others of his acts he is simply a fellow-servant, of the same or of a higher or lower grade; the master's responsibility or non-responsibility in case of injury is determined, not by the rank or grade of the offending servant, but by the character of the particular act or omission to which the injury is attributable."

The cases in which an employe may act in a dual capacity may be divided into two classes, those in which his double service arises from direct contract between the parties and those in which this relation is purely a judicial creation, having no origin in the thought or intention of the parties. Thus, an employer, as we have seen, must employ competent workmen, and even though he delegate the duty of hiring or selecting them to another, he is still responsible for the selections made as much so as though he had engaged them himself. Suppose, however, he should direct one of his ordinary employes or a foreman to hire men for him, such a man would henceforth be acting in a dual capacity, and when hiring men his employer would be responsible for his conduct, and when at work with the other men in his ordinary employment he would be simply one of them, a fellow-servant for whose conduct his principal would be no more responsible than for that of any other man in his employ.

Again, suppose an employer should appoint a locomotive engineer an inspector. In many states this is a duty of the employer and the responsibility for its performance cannot be delegated to another. In the states where this rule prevails, therefore, a locomotive engineer who also serves as an inspector acts in a dual capacity, and renders his employer responsible for his conduct when acting as an inspector while, on the other hand, he is not thus responsible when he is serving merely as an engineer.

Another illustration may be given. An absolute duty of an employer is to provide his servant "with a reasonably safe place to work in having, reference to the character of the employment in which the servant is engaged." (63) A foreman who is regarded as a fellow-servant may nevertheless assign places for those who are at work with him, and in so doing may represent his employer, and render him responsible if suitable places, such as the law requires the master to furnish, are not given to those working with him. Clearly the foreman, when assigning places for work represents the master otherwise the master would escape responsibility altogether. (64)

This class of cases, therefore, are easily enough distinguished in which the employer and employe create a dual service by express

(63) Railroad Co. v. Peterson, 762 U. S. 346, 353.

(64) Baird v. Reilly, 92 Fed. 884; Grace & Hyde Co. v. Kennedy, 40 U. S. Cir. Ct. of App. 69.

contract. But the law has also attempted to make this distinction, by declaring that when an employer appoints another to superintend and take charge of his entire business, or an entire branch of his business, he does not mean this quite, but simply he appoints him to do those things for which the employer is primarily responsible, and if he goes beyond these lines he acts as an ordinary employe, a mere fellow-servant with those around him, and for whose conduct his principal is no more responsible than for that of any other employe. The rule and reasons therefor have thus been expressed by Justice Rapallo, of the New York Court of Appeals: (65) "The liability of the master does not depend upon the grade or rank of the employe whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. On the same principle, however low the grade or rank of the employe, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master which he has confided to such inferior employe. On this principle the *Flike* case was decided. (66) Chief Justice Church says: 'The true rule I apprehend is, to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent entrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed.' If an agent employs unfit servants, his fault is that of the corporation, because it occurred in the performance of the principal's duty, although only an agent himself. So, in providing machinery or materials, and in the general arrangement and management of the business, he is in the discharge of the duty pertaining to the principal."

In a case decided about ten years afterward (67) the rule was thus expressed by the Chief Justice: "It is not every act of a superintendent for which a master is liable, for notwithstanding his general supervisory power he is still a servant, and, in respect to such work as properly belongs to a servant to do is, while performing it, discharging the duty of a servant, for whose negligence and carelessness the master is not responsible to co-servants."

When the question was first before the court in the *Crispin* case the rule was established by a bare majority of one, three members strongly dissenting and voicing their opinion through Justice Earl. "The relation of one servant to another," said these dissenters,

(65) *Crispin v. Babbitt*, 81 N. Y. 516, 518.

(66) 53 N. Y. 549.

(67) *Hussey v. Coger*, 112 N. Y. 616.

"is not determined by the fact that one has a superior position to the other, or has some control over other servants or some management of the business in hand. To place a servant in a position where the master will become responsible for his negligence to other servants, he must *pro hac vice* be in the place of the master, and his representative. In other words, to use a phrase found in some of the books, he must be the *alter ego* of the master. He need not, however, have all the powers of an absolutely general agent; but he must either be clothed with the general powers and charged with the general duties of the master, or he must, for the work in hand at least, be the superior whose commands are to be obeyed, whose acts are not to be questioned by the servants, and who thus, for the time being, represents the master. And whether a servant whose acts are complained of occupies such a position to other servants is a question to be determined, when disputed, upon sufficient evidence, by a jury.

"On the one hand, it is claimed that in determining the responsibility of the master in such case, we must look solely at the duties which were devolved upon the servant whose acts are complained of, and that if we find that the duty which he was engaged in discharging when he committed the negligent act or wrong was one of those absolute duties which the master owed to his servants, then the master is responsible, no matter what was the grade or position of the servant. On the other hand, I claim the rule to be that in determining the responsibility of the master for the negligent acts of his servant, we must look solely at the position of such servant, and we must consider the duties devolved upon him, solely for the purpose of determining such position, and if we find that he was the representative of the master, within the rule above stated, then the master must be held responsible for all his acts of negligence committed within the scope of his business entrusted to his hands, as well to co-servants as to strangers."

This decision was rendered in 1880; and at that time Justice Earl also asserted that he had made a thorough examination of the reported cases in this country and in England and could safely affirm that there was no case in which the question was involved where this dual relation had been recognized and the rule thus laid down.

The establishing of this dual relation in this second class of cases solely by judicial action is intended of course to limit the responsibility of employers to their employes. No one questions for a moment that whenever an employer treats an employe negligently he is responsible to him; is it not equally clear that when an employer appoints another to act wholly for him—either to conduct

his entire business or an entire branch of it—he means to put him in his place and render it possible for him to do all that the principal can do himself? Does the principal intend either to appoint him to act in a dual capacity, or to confine his authority strictly to those matters for which he is absolutely responsible and cannot evade by any delegation to another. Nothing of the kind. Is an agent or superintendent forbidden by his terms of employment from doing anything that may be done by any ordinary employe? Certainly not. Would his employer blame him if he went beyond the strict limit of employing men, furnishing appliances, safe places for work, etc., described under the fifth rule in this chapter, to do some other act that would advance his employer's interest? Certainly not; such an act would, or ought to, meet his employer's approval.

Lastly, if an employer were thus rendered responsible for all the acts of his representatives done within the general scope of his master's employment (and no one will question that a master can act as the ordinary servant if he choose to do so) would the responsibility be an unreasonable one for him to bear? Says Justice Earl: "It is not too much for the master to be responsible for his superintendent's negligence. I can perceive no reason founded upon public policy, as there is none founded upon any principle of natural justice, for limiting the doctrine of respondeat superior in its application to the relation existing between a master and such an agent. The master should be responsible for all his negligence while engaged in his service, because he stands in his place, representing him as his alter ego; and I can perceive no reason founded on public policy or expediency for enforcing that doctrine in such a case in favor of strangers, which does not exist for enforcing it in favor of the other servants of the common master."

Nevertheless this rule is a part of the law of every state. Thus, in Michigan, the question of fellow-service, it is declared is not determined solely from the grade or rank of the offending or injured servant, but by the character of the act performed by the offending servant. The distinction, however, between the two classes above noted is not drawn, though it should be added that many of them have been decided in harmony with it and, consequently, rest on a solid basis of fact. In Maryland also, an employe may represent his employer in purchasing supplies and yet be a fellow-servant with others in performing other duties. (68) Whether, when the facts are ascertained, a party is a fellow-servant, or a deputy master or vice-principal, is a question of law. (69)

(68) The distinction is clearly drawn in the case of *State v. Malster*, 57 Md. 287.

(69) *Yates v. McCullough Iron Co.*, 69 Md. 370.

This rule is recognized in Illinois, and has been applied to a foreman while performing the duty of a servant. In such a case he is a fellow-servant, and another injured by his negligence is without redress. In another case the foreman of a section gang failed to warn the men of an approaching train, and it was held that with respect to this duty he represented his employer, and was not a fellow-servant with those working under him. And in another case it was distinctly held that if an act by a foreman causing injury related to his duty as co-laborer, the master was not responsible, but if it resulted from the authority conferred on him over co-laborers the master would be liable.

It will be readily seen that this rule may be one of difficult application. The case of *Hussey v. Cogger*, before the New York Court of Appeals, (70) shows the difficulty in applying it. A man was employed as a superintendent to repair a vessel. He employed and discharged the workmen, regulated and directed the manner of their work, provided the means and appliances necessary to its prosecution, and determined the time and place for doing it. He was, therefore, regarded as standing in the place of his master. Nevertheless, although representing his employer in all these ways, it was possible for him to still act as a fellow-servant by doing the work of one of the employes, and this he attempted to do and so unskillfully that one of them was injured. Yet the master was held not liable because, in doing that particular thing he was acting as a fellow-servant, and not as the agent or representative of his master.

In the earlier case of *Crispin v. Babbitt*, (71) an employe in an iron works was injured through the negligence of the superintendent in letting on steam when he ought not to have done so. The court held that while he was the agent or representative of his employer in many of his acts, he was not in all; that when he did represent his employer his employer was thereby bound, but when he was not thus representing his employer his acts were to be regarded the same as those of any other fellow-servant and not binding on his employer.

The liability of his employer, therefore, for his acts, was made to turn not on his position, but on his acts. What test, then, can be applied, if any, to determine whether his acts are purely personal or representative. This is the test: "If the act is one pertaining to the duty the master owes to his servants, he is a representative of them for the manner of its performance. The converse of the proposition necessarily follows: If the act is one which pertains only to the duty of an operative, the employe per-

(70) 112 N. Y. 614.

(71) 81 N. Y. 516.

forming it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance."

Though the ability of such an individual to act in a double capacity, a vice-principal when pursuing one course of action, and an employe when pursuing another is generally established, its unwisdom has been shown on more than one occasion. In a recent case in which it was applied, Justice Mestrezat said: "In the application of this rule the grade or rank of the servant for whose conduct the employer is sought to be made liable is not the test of the employer's responsibility. It is the character or nature of the act of the employe which causes the injury that determines the liability of the employer. If the act or thing done resulting in the injury to the employe was a duty imposed upon the employer, then the negligent performance of it by an employe of any grade will render the employer liable, but if such act was in the line of the ordinary workman's duty as an employe, then the employer is not responsible, though the offending employe was a vice-principal in charge of the work generally. This rule is sustained by reason and authority. It protects the employer from the act of the employe when not in the discharge of the duties of his principal, and gives redress to an injured employe for a negligent act which should have been performed carefully and properly by the employer." (72) This was applied to the foreman of a gang of workmen over whom he had full control, engaged in raising a stone. While doing the work the foreman took the place of a workman whose duty it was to hook an appliance to the stone for the purpose of raising it, and impatiently ordered the engineer to do his part. Before the stone was fully raised the tongs slipped out and the stone fell and injured one of the employes. The majority of the court held that in thus doing the work of a workman the foreman was not acting as a vice-principal, and, therefore, the consequences of his act, even though he had been negligent, could not be visited on his employer. But Justice Dean dissented: "The evidence," he declared, "of plaintiff tended to establish the fact that the foreman, under whose supervision this part of the work was being done, was there as the representative of and in the place of his employers, the defendants. On this evidence, under all the authorities, he was a vice-principal and his employers are answerable for his negligence. Why should not those who placed such a man in such a position, with all the unchecked powers of an employer, be held responsible for his negligence? He was no more a fellow-workman of plaintiff than the employers themselves. The tendency to exempt employers from just responsibility for the neg-

(72) *Ricks v. Flynn*, 196 Penn. 263.

ligence of supervisors and bosses to whom they entrust such grave duties, is, in my opinion, too pronounced and will lead to consequences, which, if not now clearly foreseen, can, with very reasonable certainty, be conjectured.' Surely, if an employer ought not to be held liable for the negligence of a vice-principal, when he steps out of his proper limit, and serves as an employe, he ought to be held liable on the ground that his vice-principal was incompetent in not knowing his proper place and keeping within it. For, if in so acting he is transgressing his duty, he thereby furnishes the clearest evidence that he does not understand what his duty is. It is true that there are some cases in which an employe may thus act in a double capacity, a locomotive engineer as an inspector. And when he is thus acting a negligent act as an engineer ought not to be charged against his principal. But a superintendent, for example, in charge of men, who, as in the case just mentioned, acts with them, ought to be regarded as a superintendent in whatever he may do while executing his authority. And if he transcends it, those with whom he is working are ignorant of the fact, why then should they be visited with the ill consequences?

The decision in this case shows how easy it is for a court to fritter away a useful and just rule. In all these cases of dual employment, the servant acts in a far more important capacity in one employment than in the other. So true is this that it may be said of him that his employment in the one way is his principal employment, in the other as an incident. In determining all these cases this should be kept in view, for whichever be his principal employment the court should be slow to ascribe any act to the other unless it is clearly of this character. Thus, a railway engineer may act as an inspector and, when thus acting, represents his principal; but evidently his work as an engineer is his principal and far more important employment, and, therefore, every act done by him not clearly as an inspector should be considered as done by him as a mere employe and fellow-servant. On the other hand, a superintendent might act as a mere employe, but in every act of his he should be regarded as acting for his employer and representing him in so doing, unless it is very clear that he is acting otherwise.

This principle of construction seems to have been well learned by the Supreme Court of Massachusetts. Such havoc was made by the court in holding foremen and superintendents to be fellow-servants, and not representatives of their employes, that the legislature was at last compelled to rescue it from destruction by declaring that such employes represent their employers and are not to be regarded as fellow-servants. Since the enactment of this statute it has been wisely construed by the court, and while it is

still held that a superintendent may sometimes act as a mere employe, holding the relation to others of fellow-servant, every little act of his not strictly within the line of his duty is not regarded as the act of a mere employe, but is regarded, as it ought to be, a mere incident of his larger employment as an agent or representative of his employer. (73)

Again, it is a familiar principle that if an injury happens to an employe while doing anything, outside his strict line of employment, he can recover nothing therefor, however meritorious his act may be. If he is asked by another employe to aid him for a moment in doing some needful thing and he yields to the request and is injured, he can recover nothing for he was not employed to aid the other. But surely a rule which is construed so strongly against employes where they are technically in the wrong, ought to be construed just as strongly against employers when they have technically at least transgressed their line of duty. And when they have employed others to act for them and who do represent them in their most essential conduct, it is a strange shrinking of the rule to say that in some minor matter they were not employed to perform it and that, in doing so, they acted as a mere employe and, therefore, as a fellow-servant. Would it not be much nearer the truth in most of these cases to say that if he did not represent his employer when thus acting, he was a trespasser, for his employer did not hire him to act in this manner at all. In many cases the facts have shown that he was standing by and becoming impatient with the slowness or lack of skill displayed by those around him, joined them, and, while working, caused injury to one or more of the number. Is it not the literal truth to say that in all these cases he was not employed to act as a workingman at all, and he was not, therefore, one of them, but a trespasser? But is not the more reasonable way to regard these minor acts in many cases as mere incidents of the representative's conduct, and as such to hold his employer responsible therefor.

Lastly, the fact should not be overlooked that in many of the cases of dual service, the double relationship is an artificial one established by the courts and having no origin whatever in the thought, imagination, action or intention of the parties.

It may be added, however, that where an employer has an absolute duty to perform, the doing of which can be delegated, but the responsibility cannot be, the responsibility clings to him just as closely in cases in which he delegates an ordinary employe to perform it as in any others. The delegate may still be an employe with respect to everything done except the one particular act, or series of acts he is directed to do, for and in the place of his em-

(73) *Malcolm v. Fuller*, 152 Mass. 160; *Crowley v. Cutting*, 165 Mass. 436.

ployer, but in doing this one or series, he just as truly represents him as though he were doing no other. In the way of illustration may be cited a very recent case relating to the place in which an injured workman was employed, and the court remarks that "the duty of exercising reasonable care in furnishing to a servant a reasonably safe place to work is that of the master, and he cannot delegate this duty to a subordinate without placing such subordinate in his own position, and binding him to perform the same duties devolving upon the master." (74) And the reason for thus holding him as the representative of his master is that otherwise the master would escape his liability altogether. The law, therefore, does not permit him, under the guise of using an ordinary employe to act for him, to escape from a responsibility that cannot in any way be transferred to another.

7. The sixth rule is, an individual who has authority to hire, direct or control, pay and discharge men for another is his representative, and not a fellow-servant. But an individual who has authority to direct or control, pay and discharge men for another is in some states his representative; in others, he is not.

The same person may act in the dual capacity of employing persons—in which he acts as an agent—and may direct their employment, pay and discharge them, in which case he is merely acting as one of their number, and is, therefore, a fellow-servant. Thus, in Indiana, a section foreman of a railroad, with power to employ and discharge section hands, is a vice-principal when employing and discharging them, but is simply a fellow-servant with them in his control of them afterward. "The foreman," so the court has remarked, "was a vice-principal in the matter of hiring and discharging hands, for the master owes it as a duty to exercise reasonable care not to employ any but careful men, and to discharge those who prove to be negligent. But it was not so in transporting the men to and from their work. In the matter of moving the hand car and their tools to and from the locality at which they worked upon the track, they were in the discharge of a duty which they owed the master and were, therefore, fellow-servants." (75)

In those cases in which this distinction does not exist a person who is authorized to employ, direct, pay and discharge employes is an agent and not a fellow-servant. And this is also the law in Indiana in all those cases in which his dual action is not recog-

(74) *Ellis v. Northern Pacific R.*, 103 Fed. 416, 417.

(75) *Justice v. Pennsylvania Co.*, 130 Ind. 321; *Wilson v. Madison R.*, 18 Ind. 226; *Ohio R. v. Tindall*, 13 Ind. 366; *Slattery v. Toledo R.*, 23 Ind. 81; *Sullivan v. Toledo R.*, 58 Ind. 26; *Gormley v. Ohio R.*, 72 Ind. 31; *Robertson v. Terre Haute R.*, 78 Ind. 77; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Pittsburg R. v. Adams*, 105 Ind. 151; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Capper v. Louisville R.*, 103 Ind. 305.

nized. We need not stop here to consider whether the essence of the employer's liability by this rule lies in the fact that, as we have seen, the employment of servants is a cardinal duty which may indeed be performed by another, but without lessening his responsibility, or whether it lies in the fact that through another he directs their movements and, therefore, ought to be responsible for their safety. The rule itself, however, in all cases in which no distinction is made between employment and control, exists everywhere, and is indeed only an extension of the second rule and also of a branch of the fourth.

Concerning this rule, the Supreme Court of Illinois, in a railroad case, (76) thus remarks: "A servant having the exclusive control over other servants under a common master, including the hiring and discharging is, in the exercise of those powers, the representative of the master, and not a mere fellow-servant. The mere fact, however, that one of a number of servants who are in the habit of working together in the same line of employment for a common master has power to control and direct the actions of the others with respect to such employment will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to the circumstances. On the other hand, the mere fact that the servant exercising such authority sometimes or generally labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over others. Every case in this respect must stand upon its own circumstances. If the negligence complained of consists of some act done or omitted, by one having such authority, which relates to his duty as a co-laborer with those under his control, and which might just as readily have happened with one of them having no such authority, then the common master will not be liable; but when the negligent act complained of arises out of, and is the direct result of the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable. To illustrate the rule, when a railway company confers upon one of its employes authority to take charge of and control a gang of men in carrying on some particular branch of its business, he is the direct representative of the company, and all commands given by him within the scope of his authority are in law the commands of the company. The fact that he may have an immediate superior standing between him and the company makes no difference in this respect. In exercising the power, he does not stand on the same plane with those under

(76) *Chicago & Alton R. v. May*, 108 Ill. 288, 298.

his control. His immediate superiors to influence the conduct of the laborers in that department." (77)

This has been applied in Texas on several occasions, and on one of them to a master mechanic who was in charge of a round-house belonging to a railroad company. (78) "Having the power to employ and discharge the hands, such agency and powers constituted him the vice-principal of the company. He was in place of the master." The same principle has been applied to a temporary foreman who had charge of men engaged in building a bridge. (79)

This rule exists in Missouri. "Where the master," says the Supreme Court, "gives to a person power to superintend, control and direct the men engaged in the performance of work, such person is, as to the men, under him, a vice-principal, and it can make no difference whether he is called a superintendent, conductor, boss or foreman. For his negligent acts and omissions in performing the duties of the master, the master is liable. This principle of law has often been asserted by this court and applied under a variety of circumstances." (80) In applying this rule, therefore, a yard-

(77) *Chicago & Alton R. v. Hoyt*, 122 Ill. 369.

(78) *Mo. Pacific R. v. Sarse*, 22 S. W. Rep. 187; *Railway Co. v. Smith*, 76 Texas 612; *Railroad Co. v. Williams*, 75 Texas 4; *Nix v. Railway Co.*, 82 Texas 474.

(79) *St. Louis R. v. Lemon*, 83 Texas, 143.

(80) *Brothers v. Cartter*, 52 Mo. 372; *Gormley v. Iron Works*, 61 Mo. 492; *Wheeler v. Centenary Church*, 62 Mo. 326; *Church v. Railroad*, 85 Mo. 588; *Stephens v. Railroad*, 86 Mo. 221; *Hoke v. Railroad*, 88 Mo. 360; *Tahler v. Railroad*, 93 Mo. 79; *Dayharsh v. Railroad*, 103 Mo. 570; *Miller v. Mo. Pacific R.*, 109 Mo. 350.

Colorado: Denver R. v. Driscoll, 12 Colo. 520; *Colorado Midland R. v. O'Brien*, 16 Colo. 219; *Lautry v. Silverman*, 1 Colo. App. 404.

Iowa: Troughear v. Lower Vein Coal Co., 62 Iowa 576; *Hathaway v. Des Moines*, 97 Iowa 333.

Illinois: Chicago & Alton R. v. May, 108 Ill. 288.

Indiana: Louisville R. v. Graham, 124 Ind. 80; *Nall v. Railroad*, 129 Ind. 260; *Taylor v. Evansville R.*, 121 Ind. 124; *Hoosier Stone Co. v. McCain*, 133 Ind. 231.

Louisiana: Mattise v. Consumers' Ice Mfg. Co., 46 La. Ann. 1535.

Michigan: Brown v. Gilchrist, 80 Mich. 56; *Lyttle v. Railroad*, 84 Mich. 289; *Slater v. Chapman*, 67 Mich. 526; *Palmer v. Railroad*, 93 Mich. 363.

Montana: Kelley v. Mining Co., 16 Mont. 484; *Goodwell v. Montana Central R.*, 18 Mont. 293.

North Carolina: Dobbin v. Richmond R., 81 N. Car. 446; *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387.

Oregon: Anderson v. Bennett, 16 Or. 515.

Pennsylvania: Mullan v. Steamship Co., 78 Pa. 25.

South Carolina: Whaley v. Bartlett, 42 S. Car. 454.

Texas: Texas R. v. Whitmore, 58 Texas 276; *Gulf R. v. Wells*, 16 S. W. 1025; *Douglass v. Texas Mexican R.*, 63 Texas 564; *Mo. Pacific R. v. Williams*, 75 Texas 4; *Texas R. v. Nix*, 23 S. W. Rep. 328.

Utah: Reddon v. Union Pacific R., 5 Utah, 344; *Anderson v. Ogden Union R.*, 8 Utah 128.

master who hires and directs men is not a fellow-servant with a switchman. (81) Again, a servant who has full charge of the master's work and of the men employed is a vice-principal, (82) or entire charge of the selection and materials and construction of a building. (83) Indeed, the power to employ or discharge men is a proper test, for the first is emphatically a function of the employer. One who can do this is not a fellow-servant with those employed under him, in so far at least as he is performing the duty of his employer. (84)

But even this rule is denied in Massachusetts. (85) The extreme position of the court, however, has been narrowed by the legislature, for a superintendent of a factory who is entrusted with authority to hire, direct and control the operatives is no longer regarded as a fellow-servant, but as representing his employer. (86)

8. The seventh rule is, a person with authority to control the employment of men, their mode of work, is a vice-principal. Of course, the sixth rule is a stronger test and includes all the cases that are included in the rule under consideration. On the other hand, control alone in some states is not a sufficient test of primary authority. But where it is, the reasoning is cogent. It is said that accidents grow out of the control or direction of men, and, therefore, if one controls them he ought to stand for the principal as clearly as though he hired or discharged them. One of the best expressions of this rule that we have seen is by the Supreme Court of West Virginia: "At one time," the court remarks, "it was held that to make the master responsible, he must have entrusted this superior servant with the actual control of his business, made him alter ego. It was subsequently held that the superior servant must have power to employ and discharge the inferior servant. But now it seems to be considered sufficient that the inferior servant

Washington: *Zintek v. Stimson Mill Co.*, 9 Wash., 395; *McDonough v. Great Northern R.*, 15 Wash. 244.

Wisconsin: *Schultz v. Railroad*, 48 Wis. 375.

Federal: *Baltimore & Ohio R. v. Baugh*, 149 U. S. 368; *Northern Pacific R. v. Peterson*, 162 U. S. 346; *Woods v. Lindvall*, 48 Fed. 62; *Baltimore & Ohio R. v. Camp*, 31 U. S. App. 213.

(81) *Lytle v. Railroad*, 84 Mich. 289.

(82) *Slater v. Chapman*, 67 Mich. 526.

(83) *Brown v. Gilchrist*, 80 Mich. 56.

(84) *Palmer v. Railroad*, 93 Mich. 363.

(85) *Albro v. Agawam Canal Co.*, 6 Cush. 75; *Holden v. Fitchburg R.*, 129 Mass. 268.

(86) *Malcolm v. Fuller*, 152 Mass. 160; *Crowley v. Cutting*, 165 Mass. 436; *Gardner v. New England Tel. Co.*, 170 Mass. 156.

is under the control and subject to the orders of the superior servant." (87)

Many states have not adopted a seventh rule, that if one has the power to control the employment or services of men, he is a vice-principal. This would seem to be enough, if the other rule is rational, for the reason that his care or negligence springs from directing those under him far more than in hiring them. The paying and discharging of men are acts which do not bear on the question of negligence in serving. Where his dual capacity is recognized, then, indeed, his act in hiring becomes important, and he might involve his master by hiring an incompetent servant. Letting this point go for the present, is it not evident that the test of control ought to suffice, while any additional acts that might be done by a foreman or superintendent ought to clinch still more strongly his relationship to his principal?

Let us note some of the applications of this rule. In one of them a foreman was in charge of a gang of men with power to command where and when and how they should work. He was held to be a vice-principal, even though he had no power to hire or discharge them. (88) In another case the rule was applied to a foreman or boss of a hand crew who put one of them in a dangerous place to work. He, too, was held to be a vice-principal. (89) In another, a foreman in charge of a round house was held to be a vice-principal. (90) Likewise a yardmaster having power to hire and discharge employes was not a fellow-servant with a switchman employed there; (91) nor was the foreman of a gang engaged in unloading a car under his direction a fellow-servant with them; (92) nor a foreman in charge of laborers moving the roof of a railroad company's building; (93) nor is a section foreman a fellow-servant with section men under his orders. (94)

This modification of the rule was adopted from the first by the Ohio and Kentucky courts. "It may be said generally that the only case where the old rule has not been impugned is where the servants are so far working together as to be practically co-operating, and to have opportunity to control or influence the conduct of

(87) *Madden v. Chesapeake & Ohio R.*, 28 W. Va. 610, 618; *Brothers v. Cartter*, 52 Mo. 372; *Malone v. Hathaway*, 64 N. Y. 5; *Willis v. Oregon Co.*, 11 Or. 257; *Cowles v. Richmond R.*, 84 N. Car. 309; *Lalor v. Chicago R.*, 52 Ill. 401; *Chicago R. v. Lundstrom*, 16 Neb. 254; *Hough v. Railroad*, 100 U. S. 216; *Northern Pacific R. v. Herbert*, 116 U. S. 642.

(88) *Hall v. St. Joseph Water Co.*, 48 Mo. App. 356; *Cox v. Syenite Granite Co.*, 39 Mo. App. 424.

(89) *Banks v. Railroad*, 49 Mo. App. 458.

(90) *Dayharsh v. Railroad*, 103 Mo. 570.

(91) *Taylor v. Railroad*, 16 S. W. Rep. 206.

(92) *Higgins v. Railroad*, 43 Mo. App. 547.

(93) *Sullivan v. Railroad*, 107 Mo. 66.

(94) *Schroeder v. Railroad*, 108 Mo. 322.

each other, and have no superiority one over the other. Since the rule grew up as judicial legislation, the courts may properly qualify or limit it to avoid injustice in particular cases. But the rule seems to be now very generally adopted and applied by the courts of this country." (95)

"Consequently, an engineer on one train of a railroad company who is injured by the negligence of the conductor of another train of the company running in an opposite direction, or by the fault of one of the company's telegraphic operators in transmitting a telegraphic order to such conductor, the engineer being wholly without fault or the means of preventing such negligence or of avoiding its consequences, he is not the fellow-servant of the conductor, nor of the operator." (96)

In *Grady v. Kansas City Railroad*, (97) Justice Miller, of the United States Supreme Court, sat as judge of the Circuit Court. The plaintiff was engaged with half a dozen other men, under the control of a foreman, in taking up and re-laying one of the tracks in this yards. A switch engine usually employed in transferring cars from one track to another struck one of the men who was at work replacing rails. Justice Miller said: "The question is one which has been much considered of late in the courts of last resort in the states, and much discussed at the bar in these and in inferior courts. There is no unanimity in the decisions of the courts, nor in the opinion of the profession. After re-examining the matter, as I have done, in the light of these decisions and of sound principle, to the best of my ability, to understand what that may be in this connection, I remain of the opinion that a common hand engaged in the business of distributing iron rails along the side of a track, to be laid in place of other rails removed from the track, and under the control, with six or eight other men, of a boss or foreman, is not in the same employment as a man controlling and managing a switch-engine not used in carrying these rails, but in moving and transferring from one place to another cars not engaged in the business of re-laying said track."

This was in 1885. The next year *Van Wickle v. Manhattan Railway Co.*, (98) was tried in the second circuit in which a track repairer was held to be a fellow-servant with an engineer. The court, Judge Coxe, significantly remarked: "It cannot be denied that the rule which exempts the master from liability in such cases is being gradually relaxed so as to permit recoveries in many cases which would have been promptly determined a few years ago.

(95) *Railroad Co. v. Fort*, 17 Wall. 559.

(96) *Madden v. Chesapeake & Ohio R.*, 28 W. Va. 618.

(97) 25 Fed. 258.

(98) 32 Fed. 278.

Indeed, it may be said that the tendency of many recent decisions, notably Garrohy's case, (99) is to restrict it to such narrow limits that practically it exists in name only. Recognizing the marked lack of unanimity among the decisions, it may still be confidently affirmed that the proposition that persons holding the relations that the plaintiff and the engineer held to each other, are fellow-servants is maintained by a great preponderance of authority. Whether the reasons which brought the rule into being require that it should still be maintained, may well be doubted, but it is entirely clear that so far at least as this circuit is concerned, the rule is still recognized and enforced." (100)

One of the earliest cases in which the rule was established was Keary's, by the Supreme Court of Ohio. (1) "An agent or officer," it was declared, "entrusted with the control of his subordinates and the operations of the business is not engaged in a common service with them, nor is he in any just sense their fellow-servant. Their employments are distinct, although both are necessary for the successful prosecution of the business." This was applied to a conductor who was held not to be a fellow-servant with the brakeman of the same train, and who had been injured by the conductor's negligence. A lengthy opinion was rendered by Justice Rainey, one of the most elaborate ever rendered on this difficult question. Further, the judge remarked, the company commissions the conductor "to exercise that dominion over the operator of the train which essentially pertains to the prerogatives of the owner; and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man and a party to the contract of service owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him, and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both are necessary to produce the result. It is his to command and theirs to obey and execute. No service is common that does not permit a common participation, and no servants are fellow-servants when one is placed in control of the other."

This may be regarded as the extreme form of the doctrine in one direction.

In the case of *Little Miami R. v. Sterns*, (2) the court said: "From

(99) 25 Fed. 258.

(100) The court cited *Randall v. Railroad*, 109 U. S. 478; *Boldt v. Railroad*, 18 N. Y. 432; *Coon v. Railroad*, 5 N. Y. 492; *Vick v. Railroad*, 95 N. Y. 267; *Brick v. Railroad*, 98 N. Y. 211; *Quinn v. Ligtherage Co.*, 23 Blatchf. 209.

(1) 3 Ohio St. 201.

(2) 20 Ohio 415.

the very nature of the contract of service between the company and the employes, the company was under obligation to them to control and superintend with skill and care the dangerous force employed, upon which their safety so essentially depended. For this purpose the conductor is employed, and in this indirectly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operatives of the train which essentially pertains to the prerogatives of the owner, and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man and a party to the contract of service, owes to those placed under him, and whose lives depend upon his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence shall be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both are necessary to produce the result. It is his to command and theirs to obey and execute. No service is common that does not admit a common participation, and no servants are fellow-servants when one is placed in control over the other." And this rule, thus early adopted, has been preserved. (3) By this rule, therefore, a brakeman and conductor are not fellow-servants; (4) nor is a conductor and trackman, (5) nor is a foreman a fellow-servant with a repairer of cars, (6) nor is a section man on a construction train a fellow-servant with a train man. (7)

This rule is applied in Kentucky. Consequently, "a subordinate in the same service can recover for the negligence of agents who have the right and power to direct and control him, or who are his superiors with reference to the discharge of the duties pertaining to the work." (8)

In Louisiana this rule is enforced. In *Farren v. Sellers & Co.*, (9) the court declared that the master was responsible for the negligence of a servant who stands as his vice-principal and direct representative invested with his own authority over inferior servants, and that the latter, when injured by such negligence, are not bound by the doctrine of fellow-servant.

Shortly before, the same court had occasion to apply the rule in the *Ross* case, in which the United States Supreme Court de-

(3) *Berea Stone Co. v. Kraft*, 31 Ohio St. 291.

(4) *Lake Shore R. v. Spangler*, 8 N. E. Rep. (Ohio) 467.

(5) *Dick v. Railroad*, 38 Ohio St. 389.

(6) *Lake Shore R. v. Lavelley*, 36 Ohio St. 221.

(7) *Columbus R. v. O'Brien*, 4 Ohio Cir. Ct. 515.

(8) *Louisville & Nashville R. v. Collins*, 2 Duv. 117; *Louisville & Nashville R. v. Carvens*, 9 Bush. 566.

(9) 39 La. Ann. 101.

cided that a railway conductor represented his employer and was not, therefore, a fellow-servant with the engineer, brakeman or other employes engaged in running a train. When applying the rule thus established, the Louisiana court remarked that no doubt this principle might receive extension to other relations between officers having the right to command and subordinates subject to such command. (10) Notwithstanding this rule a brakeman and engineer are regarded as fellow-servants. (11) This, however, is no paring away of the rule, for they have always been thus considered except when engineers have also acted in the additional capacity of conductors. This is not infrequent when they serve on freight trains, and it has been generally held that where conductors are regarded as vice-principals, engineers are also regarded in the same manner when they serve in that capacity. (12)

In Tennessee this rule prevails, and has been applied to a section boss who is declared to be not a fellow-servant with those working under him; (13) nor is the conductor or engineer in charge of a train a fellow-servant with the fireman or employes on the train; (14) nor a telegraph operator a fellow-servant with the conductor of a train. (15) Contrary to the general rule, however, a brakeman and car inspector are fellow-servants. (16)

In Arkansas this rule prevails and was applied in *Bloyd v. Railroad Co.*, (17) in which an elaborate opinion was delivered on the question: "In some of the adjudged cases," Justice Mansfield remarks, "the distinction between the relations indicated by the words foreman and vice-principal is apparently made to depend more upon the extent or magnitude than upon the nature of the work of which the offending servant has charge. Other courts, proceeding upon what we think a sounder principle, have attached no importance to the extent of the work, but have considered only whether it was such as required a skilful or careful supervision, and where such supervision was necessary to the safety of the laborers engaged upon the work, they have held it was the master's duty to bestow it, and that if he appointed an agent to perform that duty he was responsible for his negligence." After citing from the *Ross* case, the court thus continued: "The rule established by that case, as it has been generally understood and applied by the Federal courts

(10) *Towns v. Vicksburg R.*, 37 La. Ann. 630.

(11) *Id.*

(12) But see the later case of *Mattise v. Consumers' Ice Mfg. Co.*, 46 La. Ann. 1535.

(13) *Louisville & Nashville R. v. Lohr*, 86 Tenn. 335.

(14) *East Tenn. R. v. Collins*, 85 Tenn. 227.

(15) *Nashville & Louisville R. Whelen*, 10 Lea. 351.

(16) *Nashville & Louisville R. v. Foster*, 10 Lea. 351.

(17) 58 Ark. 66.

is, that the relation of fellow-servants should not be deemed to exist between two employes, where the function of one is to exercise supervision and control over some work undertaken by the master, which requires supervision, and over subordinate servants engaged in that work, and where the other is not vested by the master with any such power of direction or management." (18) The court from whose opinion this quotation is made has declared in another case that the rule as thus understood is right in principle and is supported by the weight of authority. (19) In opposing the doctrine of the same case a text writer of authority says: "What is the special attribute of the master? Is it the mere fact that he provides materials for the work, or that he selects the servants? Is it not, more than anything else, that in him is vested the right and duty of giving orders, and directing what work shall be done, and how it shall be done? If the master chooses to delegate this authority to some one else, on what possible principle can he be allowed to relieve himself from the responsibility of having proper orders given." By another text writer the rule of the *Ross* case is styled "the rule of humanity and justice." In this case, therefore, the foreman of a squad of railroad workmen, with authority to repair and build bridges, to employ and discharge the men, and to direct their work, was declared to be the vice-principal and representative of the company.

This rule applies in Nebraska. Says Chief Justice Cobb: "I think the law established and laid down in Ohio prevails substantially throughout the western states, and will ultimately prevail everywhere." (20)

(18) *Northern Pacific R. v. Peterson*, 4 U. S. App. 579.

(19) *Woods v. Lindvall*, 4 U. S. App. 62.

(20) *Chicago & Northwestern R. v. Lindstrom*, 16 Neb. 254, 261; *Burlington R. v. Crockett*, 19 Neb. 138; *Sioux City v. Smith*, 22 Neb. 775.

Georgia: *Atlanta Cotton Factory Co. v. Speer*, 69 Ga. 137; *Blackman v. Thomson-Houston Electric Co.*, 102 Ga. 64; *Taylor v. Ga. Marble Co.*, 99 Ga. 512; *Spencer v. Brooks*, 97 Ga. 681.

Idaho: *Palmer v. Utah R.*, 2 Idaho 290.

Kansas: *Mo. Pacific R. v. Peregoy*, 36 Kan. 424; *Walker v. Gillett*, 1898, 59 Kan. 214; *Kansas City Car Co. v. Sechrist*, 54 Pac. Rep. 688; *Atchison R. v. Carter*, 55 Pac. Rep. 279.

Kentucky: *Volz v. Chesapeake & Ohio R.*, 95 Ky. 188; *Newport News R. v. Carroll*, 31 S. W. Rep. 132; *Louisville R. v. Brooks*, 83 Ky. 129; *Louisville R. v. Moore*, 83 Ky. 675.

Missouri: *Stephens v. Hannibal & St. Joseph R.*, 86 Mo. 221; *Bradley v. Chicago R.*, 138 Mo. 293; *Moore v. Wabash R.*, 85 Mo. 588; *Miller v. Mo. Pacific R.*, 109 Mo. 350.

North Carolina: *Dobbin v. Richmond R.*, 81 N. C. 446; *Kirk v. Atlanta R.*, 94 N. C. 625; *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387.

Ohio: *Mad River R. v. Barber*, 5 Ohio St. 541; *Lake Shore R. v. Knittel*, 33 Ohio St. 468; *Lake Shore R. v. Spangler*, 44 Ohio St. 471; *Cleveland R. v. Keary*, 3 Ohio St. 201.

The most noteworthy application of this test was by the United States Supreme Court in the case of an engineer named Ross, in the employ of the Chicago, Milwaukee and St. Paul Railroad, who was injured through the negligence of the conductor of his train. (21) It collided with another, and he had neglected to give the engineer an order for the running of his train, as the rules of the company required. The engineer sued the company and it sought to shield itself behind the rule that the engineer and conductor were fellow-servants. What answer did the court make?

The opinion was given by Mr. Justice Field. He began by inquiring, "What is essential to render the service in which different persons are engaged a common employment?" He remarked that the question had caused great conflict of opinion and then described how far the English courts had gone in sweeping men employed by the same person into the same class as co-fellow-servants. One of these cases, which perhaps had gone further than any other in this country, was *Holden v. Fitchburg Railroad*, decided by the Supreme Court of Massachusetts, (22) in which the court held that an employe could not maintain an action against his employer for an injury caused by the fault or negligence of another employe, even though the two were not working in company, nor had any opportunity to control or influence the conduct of each other. Indeed, the rule that they were fellow-servants extended "to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty." Accordingly, it was held in that case, that a corporation was not liable to a brakeman on one of its trains for injuries suffered from the negligent setting up and use of a derrick by workmen employed in widening the railroad, on the old ground, forsooth, that he was a fellow-servant with those employed about the derrick.

After this introduction, Justice Field took up the immediate question. He remarked that there was a clear distinction between servants of a corporation that exercised no supervision over others engaged with them in the same employment, and its agents who

South Carolina: *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262; *Jenkins v. Richmond R.*, 39 S. C. 507.

Tennessee: *Nashville R. v. Whelers*, 10 Lea 741; *Nashville R. v. Handman*, 13 Lea 423; *Hopkins v. Nashville R.*, 96 Tenn. 409; *Louisville R. v. Lohr*, 86 Tenn. 385; *Louisville R. v. Kenley*, 92 Tenn. 207; *Coal Creek Mining Co. v. Davis*, 90 Tenn. 711; *Illinois Central R. v. Spence*, 93 Tenn. 173.

Utah: *Armstrong v. Short Line R.*, 8 Utah 420. In this case the court announced that the former rule had been changed. But see *Allen v. Logan City*, 10 Utah 279.

(21) 112 U. S. 377.

(22) 129 Mass. 271.

were clothed with the control of a distinct department. "A conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters and other subordinate employed. He is, in fact, and should be treated as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants."

Justice Field then reviewed several cases in which this opinion had been declared by the state courts, dwelling at length on the Keary case, decided by the Supreme Court of Ohio, which we have already noticed. Four judges dissented, however, so that the rule was adopted by a bare majority of the court. As soon as it was announced friends and critics quickly rose to the surface. It was clearly contrary to the prevailing view in many states, yet the rule was deemed just and wise by many who understood its far-reaching importance.

The state courts had not long to wait for an opportunity to use the Ross decision as an authority in support of their rulings, or to frown upon it. By several courts the opinion was regarded with favor. The Supreme Court of North Carolina was one of the first to give utterance. The occasion was the review of the case of Mason against the Danville Railroad. (23) The court boldly said that the Ross case contained "the clearest and most philosophical discussion of the subject," who are servants engaged in a common employment, "to be found in any authority to which we have had access." The view of a conductor's relation to his employer "seems to us a reasonable and just one, and it will insure care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part and prompt and unhesitating obedience to his orders."

In Louisiana the Supreme Court, after regarding the decision with favor, depressingly remarked that "in matters of this kind where one enters upon the study of the infinite number of decisions which had been rendered by a multitude of courts, he encounters a maze of contradictory decisions and an infinite variety of qualifications which stupefy the mind and render it impossible to reach a conclusion consistent with them all. No doubt, added the court, "this principle might receive extension to other relations between officers having the right to command subordinates subject to such command." (24)

In South Carolina the Supreme Court strongly supported the rule in Ross' case, the court remarking: "It seems to us clear that unless the conductor of a railroad train is, while in charge of the train,

(23) 111 N. C. 482.

(24) *Townes v. Vicksburg R.*, 37 La. Ann. 630, 634.

the representative of the company, then the train is being run without any representative. He has entire charge of the train and every employe on it is subject to his orders.

The Ross decision was also supported by the Supreme Court of Colorado. The case calling for an application of the rule related to a superintendent or foreman engaged in extending a railroad, who had negligently injured one of the men employed under him. The foreman had changed the tools and cars used in doing the work and employed and discharged the men. The court remarked that in no proper sense of the term was he a fellow-servant with the injured employe. "The company had placed him in charge of the work, with full direction to control and supervise it, and he must be treated in reference to this work as its representative—as vice-principal. The company is answerable to all the under-servants for the negligence of such a representative while acting within the scope of his employment." (25)

In Virginia this question has arisen several times since the decision in the Ross case, and the rule has been approved. In one of them, while a train was still the conductor required a brakeman to get on a freight car and let off the brake. As he was getting on top the conductor signaled the engineer to back up; he obeyed, the cars came together and the brakeman was crushed. The company was held liable, because the conductor was regarded as its agent, and not the fellow-servant of the brakeman. "The negligence of the conductor was the negligence of the company."

Lastly may be mentioned the approval of this case by the Supreme Court of California, which regards the opinion of Mr. Justice Field as "learned and admirable." The court also adds: "Courts have gone so far as to relieve from responsibility corporations acting through general agents within the scope of their authority, classing the foremen, managers and superintendents with those under them as co-laborers; but the Supreme Court of the United States begins to turn the tide." (26)

Not an altogether vain hope so far as the state courts can aid in turning the tide, but vain, indeed, with respect to the United States Supreme Court itself.

For, ere long it reversed itself, attacking its own rule. This was done in the case of Baugh against the Baltimore & Ohio Railroad. (27) A fireman was injured through the negligence of the engineer, both of whom were managing an engine attached to a freight train. A rule of the company provided that "whenever a train or engine is run without a conductor, the engineman thereof

(25) *Denver R. v. Driscoll*, 12 Colo. 520.

(26) *Gier v. Los Angeles R. Co.*, 108 Cal. 129.

(27) 149 U. S. 368.

will also be regarded as conductor and will act accordingly." So the question under the operation of this rule was precisely like the question in the Ross case. Yet the court decided that both were fellow-servants and, consequently, the company was not liable. The reasons for this reversal, which were stated by Mr. Justice Brewer, may be given. "Prima facie," he begins, "all who enter into the employ of a single master are engaged in a common service and are fellow-servants and some other line of demarcation than that of control must exist to destroy the relation of fellow-servants. All enter the service of the same master, to further his interests in the one enterprise; each knows, when entering into that service, that there is some risk of injury through the negligence of other employes, and that risk, which he knows exists, he assumed in entering into the employment."

Mr. Justice Field was still a member of the court and dissented most vigorously from the majority, supported by the Chief Justice. In 1900 the finish was made of the Ross case, in the case of *Conroy v. New York and New England Co.* (28) Justice Shiras wrote the opinion of the court and reviewed at great length the decisions rendered by the state courts, showing clearly enough that the rule in many of them was in harmony with the new rule established by the federal court. Thus, the attempt made by the Supreme Court in the Ross case to convert the railway conductor into a servant or agent of his employer has entirely failed, and he still ranks as a fellow-employee along with the brakeman and other trainmen. Furthermore, it will be seen from the extract quoted from Mr. Justice Brewer's opinion that all the servants of a company generally are to be regarded as fellow-servants, and thus the doctrine announced in the case of *Priestley and Farwell*, described in the first chapter of this work, has at last been stretched to include almost all servants working under a common employer, and relieving a company or employer from all liability to respond for their negligence, on the ground that the employes, whether few or many, assume the risk. Doubtless the Supreme Court would hold, in the case of a railroad company, that the president, vice-president and superintendent and a few other officers are its agents and not fellow-servants of the thousands working under their immediate or remote direction; but who are its agents and who are not? The last case, that of *Conroy*, leaves all in the dark. It smites down every rule that the courts have tried to draw between agents and non-agents employed by a company; it shows that they are all based on a sandy foundation and ought not to stand. What, then, is left of this doctrine of fellow-service? We cannot see anything in the way of a federal rule except that of the department test that has been al-

ready considered. It is true that a few of the leading officers may still be regarded as agents, for whose acts their company may be liable, but the court does not take the trouble to define them. Perhaps it was not worth while, for they are so few and remote from the work of most of the employes no occasion is likely to arise in which they would incur any negligence whereby others would suffer.

Notwithstanding Justice Cobb's prediction, this rule at present is receding. The courts of Louisiana and Virginia have greatly modified their earlier position, and there are few if any signs of its adoption by other states.

Indiana has been among the most prominent states in opposing it. The rule has long prevailed in that state that control or direction alone of an employe does not constitute the director a vice-principal. A foreman, therefore, or other similar agent, to whom the master's authority is not delegated, is a fellow-servant with those under his employ.

Nor does the rule prevail in California. Indeed, a statute prevents its operation and provides that an employer is not responsible for the conduct of his foreman in directing operations. But the employer is responsible for furnishing safe appliances, etc., and also in selecting the foreman or superintendent. If he is incompetent, then the employer is liable for the act. (29)

Nor does this rule, the test of control, prevail in New York. Unless, therefore, fellow-servants work in different departments, or their director who is negligent is a vice-principal, or the principal himself, they are fellow-servants, and redress is denied them, assuming, of course, that the employer has done his duty in furnishing safe appliances. A few application of the rule, therefore, may be considered. An employe engaged in oiling a machine in a factory and the engineer are regarded as fellow-servants; (30) likewise a laborer and engineer employed by the same company; (31) a foreman and men under his direction; (32) workmen on a railroad repairing a pit and and a car coupler who fell into it; (33) a timber boss who superintendents the repair of a mine and those who are assisting him in making repairs; (34) also, a brakeman and conductor. (35)

(29) *McLean v. Blue Point Gravel Co.*, 51 Cal. 255; *Stephens v. Doe*, 73 Cal. 26.

(30) *Henshaw v. Pond's Extract Co.*, 66 Hun. 632.

(31) *Mele v. Canal Co.*, 14 N. Y. Supp. 630; *Russell v. Railroad*, 17 N. Y. 134.

(32) *Brown v. Maxwell*, 6 Hill 592; *Sherman v. Railroad*, 17 N. Y. 153; *Malone v. Hathaway*, 64 N. Y. 5.

(33) *Filbert v. Delaware & Hudson Canal Co.*, 121 N. Y. 207.

(34) *Jenkins v. Mahopac Iron Ore Co.*, 57 Hun 588.

(35) *Slater v. Jewett*, 85 N. Y. 61.

Alabama: *Mobile R. v. Smith*, 59 Ala. 245.

California: *Donnelly v. San Francisco Budge Co.*, 117 Cal. 417.

9. Passing from these rules determining the relationships of those in higher authority to those below them, we will next consider the relationship to one another of those who are essentially in the same grades of service. The eighth rule, therefore, is servants deriving authority from the same employer and engaged in the same business, though in different departments are fellow-servants. This exists chiefly in Massachusetts, Minnesota and Maryland.

"In the case of an injury," says Justice Gray, of the Supreme Court of Massachusetts, "to one servant by the negligence of another, it is immaterial whether he who causes and he who sustained the injury are or are not engaged in the same or similar labor, or in positions of equal grade or authority. If they are acting together under one master in carrying out a common object, they are fellow-servants." (37)

Another application of the rule has been made to a superintendent and operative in a cotton-mill, who are declared to be fellow-servants. In the case of *Albro v. Agwam Land Company*, (37) the

Colorado: *Denver R. v. Driscoll*, 12 Colo. 520; *Colo. Midland R. v. Naylor*, 17 Colo. 501.

Connecticut: *Darrigon v. New York R.*, 52 Conn. 285; *Sullivan v. New York R.*, 62 Conn. 209.

Indiana: *Drinkout v. Eagle Mach. Works*, 90 Ind. 423; *Robertson v. Chicago R.*, 146 Ind. 486.

Iowa: *Newbury v. Getchel Lumber Co.*, 100 Iowa 441; *Fosburg v. Phillips Fuel Co.*, 93 Iowa 54.

Louisiana: *Mattise v. Consumers' Ice Mfg. Co.*, 46 La. Ann. 1535.

Maine: *Blake v. Maine Central R.*, 70 Me. 60; *Dube v. Lewiston*, 83 Me. 211.

Maryland: *Norfolk R. v. Hoover*, 70 Md. 253; *Yates v. McCullough Iron Co.*, 69 Md. 370.

Massachusetts: *O'Brien v. Rideout*, 161 Mass. 170; *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70.

Michigan: *Beesley v. Wheeler*, 103 Mich. 196; *Andrew v. Winslow Brothers*, 76 N. W. Rep. 86.

Minnesota: *Carlson v. Northwestern Tel. Ex. Co.*, 63 Minn. 426; *Lindvall v. Woods*, 41 Minn. 212.

New Jersey: *O'Brien v. Am. Dredging Co.*, 53 N. J. Law 291; *McLaughlin v. Camden Iron Works*, 60 N. J. Law 557.

New York: *McCosker v. Long Island R.*, 84 N. Y. 77; *Gibbons v. Brush Electric Co.*, 36 N. Y. App. Div. 140.

North Dakota: *Ell v. Northern Pacific R.*, 1 N. Dak. 336.

Oregon: *Mast v. Kern*, 54 Pac. Rep. 950; *Willis v. Oregon R.*, 11 Ore. 257.

Pennsylvania: *Durst v. Carnegie Steel Co.*, 173 Pa. 162; *Greenway v. Conroy*, 160 Pa. 185; *McGinley v. Levering*, 152 Pa. 366.

Rhode Island: *Larich v. Moies*, 18 R. I. 513; *Miller v. Coffin*, 19 R. I. 164.

Vermont: *Hard v. Vermont R.*, 32 Vt. 473; *Davis v. Central Vt. R.*, 55 Vt. 84.

Virginia: *Norfolk R. v. Nuckols*, 91 Va. 193; *Norfolk R. v. Donnelly*, 88 Va. 853; *Richmond Locomotive Works v. Ford*, 94 Va. 627.

Wisconsin: *McMahon v. Ida Mining Co.*, 95 Wis. 308; *Luebke v. Chicago R.*, 59 Wis. 127.

(36) *Gilman v. Eastern R.*, 10 Allen 233, 236.

(37) 6 Cush. 75, 77.

court said: "It cannot affect the principle that the duties of the superintendent may be different, and perhaps may be considered as of a somewhat higher character than those of the plaintiff; inasmuch as they are both the servants of the same master, have the same employer, are engaged in the accomplishment of the same general object, are acting in one common service and derive their compensation from the same source."

In harmony with this rule a car repairer and a switchman are fellow-servants; (38) the engineer of a train and a switchman; (39) an apprentice in a railroad company's shop acting as a fireman on a train and a switchman; (40) a railroad laborer who is employed in repairing the road-bed while going to his place of work, and those in charge of the train carrying him. (41) Lastly may be mentioned a brakeman and another in a different train. They, too, are swept within this all-embracing rule. (42)

In *Holden v. Fitchburg R.*, (43) the court said: "It is well settled in this Commonwealth and in Great Britain that the rule of law, that a servant cannot maintain an action against his master for an injury caused by the fault or negligence of fellow-servants, is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty; and it makes no difference that the servant whose negligence causes the injury is a sub-manager or foreman of higher grade or greater authority than the injured servant." (44)

This rule, that all employed by the same master are fellow-servant, has been applied with only slight modifications in Minnesota. One of the earlier cases related to an engineer of a railroad who was injured through the negligence of a station agent. "Prima facie," said the court, "the plaintiff and the station agent were fellow-servants, for they were acting together under one master in carrying out a common object. They were engaged in the same common employment under the same general control. Is there anything to except the station agent from this prima facie relationship of fellow-servant to the plaintiff? He would be excepted only if he stood in the place of the master as a vice-principal, or, as it is sometime

(38) *Gilman v. Eastern R.*, 10 Allen 233.

(39) *Farwell v. Bostern & Worcester R.*, 4 Met. 49.

(40) *King v. Boston & Worcester R.*, 9 Cush. 112.

(41) *Gilshannon v. Stony Brook R.*, 10 Cush. 228; *Gilman v. Eastern R.*, 10 Allen 233; *Seaver v. Boston & Maine R.*, 14 Gray 466.

(42) *Hayes v. Western R.*, 3 Cush. 270.

(43) 129 Mass. 271.

(44) *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70.

expressed, as the master's alter ego. But one employed becomes a vice-principal as respects another only when he is entrusted with the performance of some absolute and personal duty of the master himself, such as the providing of proper instrumentalities with which the service required of an employe is to be performed, or the general management and control of the master's business, or of some branch of it." (45) In such cases the negligence of the vice-principal is the negligence of the master. But the general management or control of the master's business or some branch thereof, does not include the case of one simply charged with special duties performing them under the direction of the master or under the control of superior officers. (46) The engineer and station master, therefore, were fellow-servants. The same relationship was declared to exist between a baggage master and switch tender; (47) a scaler in a mill-yard and those engaged there in piling lumber; (48) the foreman of a round house and a truck packer; (49) the foreman of a section and the section men; (50) section men and those engaged in running trains; (51) foremen and laborers under them while engaged in building a trestle. (52)

Neither the seventh rule nor the sixth, which hold that one who hires, controls and discharges servants is to be regarded as a vice-principal are tests of vice-principalship in that state. The duty to furnish safe appliances, etc., and to appoint competent persons to keep them in repair is a duty of the employer, "but where," so the court remarks, "there has been no lack of diligence on the part of the master in the performance of those duties, it is manifest that the use and operation of machinery, and the execution and management of the details of the business, must necessarily be committed to those who, from the nature of their employment, for a common master and a common purpose are co-servants, who must each, among the hazards of the employment, be deemed to assume the risk of the negligent acts, omissions or mistakes of fellow-servants. (53) This principle was fatal to the cause of an employe who, with other servants, was assisting in handling and removing cars in a railroad yard. They were under the direction of a foreman who, in turn, received orders from the yard master and division

(45) *Drymala v. Thompson*, 26 Minn. 40.

(46) *Brown v. Minneapolis R.*, 31 Minn. 553.

(47) *Roberts v. Railroad*, 33 Minn. 218.

(48) *Fraser v. Red River Lumber Co.*, 45 Minn. 235.

(49) *Gonsior v. Railroad*, 36 Minn. 385.

(50) *Olson v. Railroad*, 38 Minn. 11.

(51) *Foster v. Railroad*, 14 Minn. 360; *Connelly v. Railroad*, 38 Minn. 80.

(52) *Lindvall v. Woods*, 41 Minn. 212.

(53) *Fraker v. St. Paul R.*, 32 Minn. 212.

superintendent; and the foreman was deemed a fellow servant with the other.

In Maryland this rule is enforced. Thus says the court: "The decided weight of authority is to the effect that all who serve the same master work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though it may be in different departments of it, are fellow-servants, each taking the risks of the other's negligence. To state the rule more generally, all who are engaged in accomplishing the ultimate purpose in view, that is, running the road, must be regarded as engaged in the same general business, within the meaning of the rule. It follows, therefore, that the brakeman on the train is in the same common employment with the mechanics in the shop to repair and keep in order the machinery, and with the inspector of the machinery and rolling stock of the road, and the superintendent of the movement of the trains." (54)

Yet it has not been adopted by the Supreme Court of the United States. Speaking through Justice Brewer, the court says: "The truth is, the various employes of one of these large corporations are not graded like steps in a staircase, those on each step being as to those on the step below in the relation of masters and not of fellow-servants, because not subject to any control by one over the others. Prima facie, all who enter into the employ of a single master are engaged in a common service, and are fellow-servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow-servants. All enter into the service of the same master to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employes, and that risk, which he knows to exist, he assumes in entering into the employment." (55) Wherever this rule prevails it is quite evident that almost every employe is swept within the relationship of fellow-service—very few, indeed, remain outside. (56)

10. The last rule or test of fellow-service is that of co-assistance, or equal authority or direction. It is also known as the different department test or limitation, and it applies to employes who do not differ essentially in rank but in the kind of labor performed by them. This rule has no recognition whatever in the states where the last described prevails. It has a firm footing, though, in a goodly number of states, and the pioneer was Illinois. In one of

(54) *Wonder v. Baltimore & Ohio R.*, 32 Md. 418; *Hamathy v. Railroad*, 46 Md. 280; *Yates v. McCullough Iron Co.*, 69 Md. 370.

(55) *Baltimore & Ohio R. v. Baugh*, 149 U. S. 368, 384.

(56) *Id.* 382.

the cases the rule is thus expressed by Chief Justice Scholfield: "The servants of the same master, to be co-employees, so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business, that is, the same line of employment—or that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. The idea is, that the relation between the servants must be such that each, as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against the consequences; and, of course, where there is no right or no opportunity of supervision, or when there is no independent will and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of his immediate superior, the doctrine can have no application. How can the laborer be profited by the knowledge of the usual manner of doing work in another department, if he is unable, in any reasonable way, while engaged in the proper discharge of his duties, and without disobedience to his immediate superiors?" (57)

The way this rule is regarded by the Supreme Court of Missouri is worthy of notice. "Guided by the real reason for the rule, it seems to us it should be applied only in those cases where the servant injured and the one inflicting the injuries are so associated

(57) North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57, 64; Chicago R. v. Moranda, 93 Ill. 302; Chicago & Alton R. v. May, 108 Ill. 288; Chicago R. v. Geary, 110 Ill. 383.

Arizona: Hobson v. New Mexico R., 11 Pac. Rep. 545.

Georgia: Cooper v. Mullins, 30 Ga. 150; Krogg v.

Illinois: Ryan v. Chicago R., 60 Ill. 171; Pittsburg R. v. Powers, 74 Ill. 341; see especially Chicago R. v. Moranda, 93 Ill. 302.

Kentucky: Louisville R. v. Rains, 23 S. W. Rep. 505 (1893); Illinois Cent. R. v. Ackley, 87 Ky. 278.

Missouri: Parker v. Hannibal & St. Joseph R., 109 Mo. 362; Musick v. Packing Co., 58 Mo. App. 322.

Nebraska: Union Pacific R. v. Erickson, 59 N. W. 347 (1894).

Tennessee: Nashville R. v. Jones, 9 Heisk. 27; Nashville R. v. Carroll, 6 Heisk. 347; Cool Creek Mining Co. v. Davis, 90 Tenn. 711.

Utah: Pool v. Southern Pacific R., 7 Utah 303; Webb v. Denver R., 7 Utah 363; Daniels v. Union Pacific R., 6 Utah 357.

West Virginia: Madden v. Chesapeake & Ohio R., 28 W. Va. 610.

Idaho: Palmer v. Utah R., 2 Idaho 290.

Mississippi: Illinois Central R. v. Hunter, 70 Miss. 471.

Ohio: Cincinnati R. v. Margrat, 51 Ohio St. 130.

Indiana: Gillenwater v. Madison R., 5 Ind. 339. The rule was afterward repudiated in that state. Columbus R. v. Arnold, 31 Ind. 174; Gormley v. Ohio R., 72 Ind. 31.

Federal: Pike v. Chicago R., 41 Fed. 91; Garrahy v. Kansas City R., 25 Fed. 258.

and related in their work that they can observe and have an influence over each other's work, and can report delinquencies to a common correcting power or head. In short, they should be fellow-servants in fact, and not simply in diabolic theory. If in separate, distinct departments, so that the circumstances just quoted do not and cannot exist, then they are not fellow-servants in any just and fair meaning of the rule. The mere fact that a defective appliance causing injury was constructed by a fellow-servant, does not release the master from liability therefor; but he is not liable if he furnished suitable materials for the appliances and competent workmen to construct it, and entrusted them with its construction as part of the work which they were employed to perform, and one of them is injured in its construction by reason of a defect therein. All so engaged, as to each other, are fellow-servants." (58)

Turning now to the application of this rule in Illinois, locomotive engineers on the same road are fellow-servants; (59) so are brakemen and conductors; (60) so is an engineer employed by a mining company to let a cage down a shaft with a track-layer; (61) so is a laborer on a construction train with the engineer and conductor; (62) so is a blacksmith employed by a railroad and a conductor of a train while going to remove a wreck. (63)

The Illinois rule of co-association as a test of fellow-service has been applied in West Virginia. (64) The injured servant was employed to take and record the numbers on cars coming into the station. His work was in the engine yard. He was injured by an engineer who was running a switching engine. The court says: "Plainly this engineer and car numberer were fellow-servants. There was a natural and necessary connection between the classes of service they rendered, bringing them into contact with each other in the same place in the execution of the master's business, which was the pursuit common to both, and they were under common pay and control of that master, and it is no matter that their work was dissimilar. Neither was the agent of the master as to the other."

This rule is often known as the department rule and under that name has been applied in many states. One of the most elaborate statements of the rule is by Justice Brewer, in *Baugh's case*, (65) for the court, after overthrowing the principle of control as a test of fellow-service, clung to this fragment. "If the business of the

(58) *Parker v. Hannibal & St. Joseph R.*, 109 Mo. 409.

(59) *Ohio R. v. Robb*, 36 Ill. App. 627.

(60) *Chicago R. v. Snyder*, 117 Ill. 376.

(61) *Niantic Coal & Mining Co. v. Leonard*, 126 Ill. 216.

(62) *Miller v. Railroad*, 24 Ill. App. 326.

(63) *Abend v. Railroad*, 111 Ill. 202.

(64) *Beuhring v. Chesapeake & Ohio R.*, 37 W. Va. 502.

(65) 149 U. S. 383.

master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employes under them, vice-principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under the charge of one superintendent. But this rule can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct. Thus, between the law department of a railway corporation and the operating department there is a natural and distinct separation, one of which makes the two departments like two independent kinds of business in which the one employer and master is engaged. So, oftentimes, there is in the affairs of such corporation what may be called a manufacturing or repair department; these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has control of it, is as to it in the place of the master. But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice-principal or representative of the master."

In Missouri, this rule was elaborately considered in *Parker v. Hannibal & St. Joseph Railroad*, (66) the court saying: "We believe it is conceded on all hands that there are certain duties personal to the master, and for the non-performance of which, resulting in any injury, he is liable even to a servant. Thus, he must observe due care in furnishing suitable machinery and appliances, in seeing that the machinery and appliances are kept in repair; in the selection of competent and trustworthy servants; in making suitable rules and regulations for the conduct of a complex business, and in seeing that youthful persons receive proper warning. It is often said that the servant entrusted with the performance of the duties personal to the master is not a fellow-servant with those engaged in the prosecution of other work; but such statements are misleading, and have been the source of much trouble. The master is liable for a negligent performance of these duties no matter by or through whom he undertakes to perform them."

This rule has been applied in Michigan. A saw-mill hand who

cleans out saw dust from the machinery is, therefore, a fellow-servant with the engineer; (67) so is a brakeman and conductor; (68) so is a brakeman and an employe who is loading a car; (69) the foreman in a blast furnace having charge of the inside is a fellow-servant with the engineer of the locomotive used in moving cars in the business; (70) so are painters and carpenters at work on the same house; (71) so is a section hand with a conductor and engineer. (72) On the other hand, servants who are digging a trench in a lumber yard and other who are hauling lumber are not fellow-servants. (73)

The rule is recognized in Florida and in applying it the court has remarked: "If one was engaged as a common laborer to work on the road bed or gravel train, he could not be a fellow-servant with the engineer or conductor of a passenger train, but would be a fellow-servant with all employed on the road bed or gravel train, if his employment was in a common work, and brought him in immediate contact with them, and risk through them, although working under the orders of a different boss or foreman in the said common work, and in different sorts of work." (74)

This rule is also a part of the law of Virginia, and employes in different departments of the common employment, though of the same grade, are not fellow-servants. Engineers, on the contrary, employed on the same road are fellow-servants, for they belong to the same department.

The question has been well answered by the Supreme Court of that state, who are co-employes. "They are co-employes engaged in the same department of service, who are thrown together in the performance of a common duty, and having opportunity to observe and judge of the liability and qualification of each other." In *Moon v. Railroad*, (75) the same court said: "The fellow-servant or co-employe for whose negligence the company is not liable is one who is in the same common employment—that is, in the same shop, or placed with or having no authority over the one injured and who is no more charged with the discretionary exercise of powers and duties imperatively resting upon the master than the injured party; but where a person is placed in charge of the construction or repair of machinery, the dispatching of trains, the maintenance

(67) *Bergstrom v. Staples*, 82 Mich. 654.

(68) *Smith v. Potter*, 46 Mich. 258.

(69) *Day v. Railroad*, 42 Mich. 523.

(70) *Adams v. Iron Cliffs Co.*, 78 Mich. 271.

(71) *Hoar v. Merritt*, 62 Mich. 386.

(72) *Hanson v. Railroad*, 79 Mich. 409.

(73) *Sadowski v. Michigan Car Co.*, 84 Mich. 100.

(74) *Parish v. Railroad*, 28 Fla. 251.

(75) 78 Va. 74.

of ways, etc., he is not a fellow-servant with those under him, nor with those in a different department of the service. He is the agent of the company which has assumed through him the performance of duties which are absolute and imperative, the omission or negligent performance of which the law will in no wise excuse."

The department test is also applied in Texas. In the case of the *Missouri Pacific Railway v. Williams*, (76) the court held that an employe who had charge of a special department, with powers to hire and discharge men, was not a fellow-servant with them. Says the Court: "A servant who has the authority to employ other servants under his immediate supervision exercises an important function of his master, and has a full control over him as his master would have, were he present acting in person. The subordinate, in such a case, is as much the servant of the agent who employs and controls him, as he would be of the master, were the latter discharging the functions of his agent." A railroad employe in the transportation department is, therefore, a fellow-servant with those employed there; so is a conductor on a gravel train and a laborer. But a track repairer is not a fellow-servant with those who operate regular trains.

11. One other view prevails which has thus been expressed by the Supreme Court of Arkansas. "It seems that the courts have been inclined to determine whether the relations exists, or does not exist, according to the circumstances of each case, as it arises, rather than to formulate any rule of general application." (77) Nor is the Supreme Court of Arkansas a solitary supporter of this position. After vainly trying to apply several rules this is the despairing conclusion recently announced by the Supreme Court of Illinois. Says Justice Mulkey: (78) "The mere fact that one of a number of servants who are in the habit of working together in the same line of employment for a common master has power to control and direct the action of the others with respect to such employment, will not, of itself, render the master liable for the negligence of the governing servant resulting in an injury to one of the others, without regard to other circumstances. On the other hand, the mere fact that the servant exercising such authority sometimes, or generally, labors with the others as a common hand, will not, of itself, exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Every case in this respect must depend upon its own circumstances."

The courts, therefore, that have adopted this guide have some-

(76) 75 Texas 4.

(77) *Bloyd v. Railway Co.*, 58 Ark. 70.

(78) *Chicago & Alton R. v. May*, 108 Ill. 288, 298. Recently quoted in *Gall v. Beckstein*, 173 Ill. 187, 190; *Abend v. Terre Haute R.*, 111 Ill. 202.

times applied the principle of employment and control, at another time that simply of control, at another the department or the co-association test, in their determinations. The Illinois decisions read in this light are quite as intelligible as those of any other state. They are very numerous but easily understood when each is considered as standing by itself, and quite as harmonious as those of other states which have sought to be guided by the rules we have described.

But what shall be said of a system of jurisprudence which requires an injured employe to resort to the slow and costly process of an action at law to determine the question whether such a legal relationship exists between himself and his employer that he has a right to demand compensation for his injury? This is not intended as a reflection on the courts, which have honestly and intelligently sought to administer the law, but is a reflection on the law or lack of the law itself. Surely such a state of things is in utter disharmony with an intelligent legal system.

CHAPTER X.

CONTRIBUTORY NEGLIGENCE.

1. Next to the question who are fellow-servants, the question of determining the liability of employer and employe when both are negligent has given the courts the greatest trouble. In many of them the rule has been thus stated. "When it appears that the negligence of the parties was concurrent and co-operated to produce the injury no action will lie, the law refusing to apportion the fault and regarding the negligence of either party as equally proximate." (79) Says Justice Swayne: "It has been a rule of law from

(79) Kentucky: Paducah & Memphis R. v. Hoehl, 12 Bush. 41; Ky. Central R. v. Thomas, 79 Ky. 160.

Connecticut: Isbell v. New York & New Haven R., 25 Conn. 556.

Georgia: Brighthope R. v. Rogers, 76 Ga. 443.

Maryland: Northern Central R. v. State, 31 Md. 357; Toledo & Wahash R. v. Goddard, 25 Md. 185.

Michigan: Williams v. Michigan Central R., 2 Mich. 259.

Mississippi: Memphis & Charleston R. v. Whitfield, 44 Miss. 466.

Missouri: McKeon v. Citizens R., 43 Mo. 405.

North Carolina: Herring v. Wilmington & Raleigh R., 10 Ired. (Law) 402.

New York: Owen & Hudson River R., 35 N. Y. 516.

Pennsylvania: Catawissa R. v. Armstrong, 49 Pa. 186.

Tennessee: Louisville & Nashville R. v. Burke, 6 Cald. 45.

Virginia: Dun v. Seaboard & Roanoke R., 78 Va. 45; Baltimore & Ohio R. v. Sherman, 30 Gratt. 805; v. Mills, 76 Va. 773; Richmond & Danville R. v. Moore, 78 Va. 93; Richmond & Danville R. v. Yeamans, 86 Va. 860; Rudd v. Richmond & Danville R., 80 Va.

Wisconsin: Potter v. Chicago & Northwestern R., 21 Wis. 372.

time immemorial, and it is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual fault of both parties. Where it can be shown that it would not have happened except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained." (80)

This rule, which prevails more widely than any other in this country, had its origin in England, and was first stated in the case of *Butterfield v. Forrester*, (81) and afterward in *Bridge v. Grand Junction Railway Co.* (82) in *Davis v. Mann*, (83) and in *Dowell v. General Steam Nav. Co.* (84) It was most fully stated in *Tuff v. Warman*, (85) Justice Wightman saying: "It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover; in the latter not, as, but for his own fault the misfortune would not have happened. Where negligence or want of ordinary care and caution would not, however, disentitle him to recover, unless it were such that, but for that negligence or want of ordinary care or caution, the misfortune would not have happened; nor if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff."

This rule has been adopted in many states. The form of statement by the Supreme Court of Appeals of Virginia is more lucid than any other we have seen. "That a person who, by his own default has brought upon himself a loss or an injury can claim no loss or compensation for it from another, is a principle of universal application; and it is equally true, that if the imprudence or negligence has so materially contributed to the loss or the injury that but for such imprudence or negligence it would not have occurred, he can claim no recompense from another who has been instrumental in causing it, unless the latter, upon the discovery of the danger into which the party had brought himself by his own fault, could by the use of such diligence as the extent of the danger and the nature of the threatened injury required, have avoided the

(80) *Railroad Co. v. Jones*, 95 U. S. 439.

(81) 11 East 60.

(82) 3 M. & W. 246.

(83) 10 M. & W. 54.

(84) 5 E. & B. 206.

(85) 5 C. B. 573.

occurrence. If, in other words, the injury though inflicted by another, was unavoidable by the exercise of proper diligence, by reason of the situation of peril into which the party by his own neglect, had placed himself, he must be considered as the party solely in fault, and as the author of his own misfortune." (86)

In New York, in the case of *Johnson v. Hudson River R.*, (87) the court declared the true rule to be that "the jury must eventually be satisfied that the plaintiff did not by any negligence of his own contribute to the injury. The evidence to establish this may consist in that offered to show the nature or cause of the accident, or in any other competent proof. To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of the defendant's delinquency may be such as to prove *prima facie* the whole issue; or the case may be such as to make it necessary for the plaintiff to show by independent evidence that he did not bring the misfortune by himself. No more certain rule can be laid down."

2. The federal rule will next be given. It has been thus stated: "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to the qualification that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence." (88)

This rule may be made clearer by considering the qualification which, in some states, is a rule of itself. Thus, in North Carolina, it is declared that "notwithstanding the previous negligence of the plaintiff, if at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and

(86) *Dun v. Seaboard & Roanoke R.*, 78 Va. 645, 658; *Richmond & Danville R. v. Anderson*, 31 Gratt. 813.

(87) 20 N. Y. 65, 73.

(88) *Grand Trunk R. v. Ives*, 144 U. S. 408, 429.

Georgia: *Central Railroad & Banking Co. v. Davis*, 19 Ga. 437; *Macon & W. R. v. Davis*, 18 Ga. 679.

Maryland: *Northern Central R. v. State*, 17 Md. 8; *Baltimore & Ohio R. v. State*, 33 Md. 542.

Missouri: *Brown v. Hannibal & St. Joseph R.*, 50 Mo. 461.

Ohio: *Kerwhahee v. Cleveland R.*, 3 Ohio St. 172.

prudence on the part of the defendant, an action will lie for damages." (89)

In the Gunter case he was employed as a foreman in running a steam saw mill belonging to the defendants, and among other duties was required to oil the machinery. Once, while doing this and standing among the machinery, the defendant, without giving him any notice, turned on the steam and set the mill in motion, whereby he was injured. The court remarked: "Whatever want of care for his own safety the plaintiff may have manifested in occupying a place of peril while doing his work, no harm would have come to him but for the hasty and inconsiderate act of the defendant in starting the mill without signal, warning or himself looking to see, as he could have done, whether the oiling, then to be done, was finished, and the plaintiff had retired from his position. This care and attention would have prevented the accident, and to this absence it must be attributed. The place of peril assumed by the plaintiff in doing his work not only did not excuse the defendant, but imposed upon him greater diligence and a higher duty in examining to see if the way was clear for a resumption of the sawing. The plaintiff's exposure of his person was not a cause but a condition which rendered the injury possible and actual, as the result of the absence of the caution which was imposed upon the defendant in consequence."

3. In Maine, the rule is declared to be "if the party by the want of ordinary care contributed to produce the injury, he will not be entitled to recover. But if he did not exercise ordinary care, and yet did not by the want of it contribute to produce injury he will be entitled to recover." (90)

4. The Massachusetts rule is: "Though there may have been negligence on the part of the plaintiff, yet he is entitled to recover unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence." (91)

The English rule does not apply in Massachusetts in cases of contemporaneous negligence by both parties. Thus, the court says: "Where the negligence conduct of the two parties is contemporaneous, and the fault of each relates directly and proximately to the occurrence from which the injury arises, the rule of law is rather that the plaintiff cannot recover if by due care on his part he might have avoided the consequences of the carelessness of the defend-

(89) *Gunter v. Walker*, 85 N. Car. 310; *Daggett v. Richmond R.*, 8 N. Car. 305; *Deans v. Wilmington R.*, 107 N. Car. 686.

(90) *Kennard v. Burton*, 25 Me. 39, 47.

(91) *Lucas v. Taunton R.*, 6 Gray 64.

(92) *Murphy v. Deane*, 101 Mass. 455, 466, citing *Lucas v. New Bedford & Taunton R.*, 6 Gray 64; *Robinson v. Cone*, 22 Vt. 213.

ant. (92) We think it is manifest that the rule laid down in *Tuff v. Warman* is not the correct rule of law which governs ordinary cases of injury by negligence; but whenever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery; and the burden is always upon the plaintiff to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part." (93)

5. In Vermont, the rule has thus been expressed by Justice Redfield: "In order to sustain the action on the case for negligence of the defendant it must appear that the injury did not occur from any want of ordinary care on the part of the plaintiff, either in whole or in part. In other words, if ordinary care on the part of the plaintiff would have enabled him to escape the consequences of the defendant's negligence, he has no ground of complaint. He may be said, in such a case, to have been himself the cause of any injury which he may have sustained under such circumstances." In this case the English rule declared in *Davies v. Mann* and other cases mentioned was fully considered and not wholly approved. (94)

6. The rule in Pennsylvania has always been that if "the negligence of the party contributed in *any* degree to the injury he cannot recover. This is a safe rule, easily understood, and cannot well be frittered away by the jury." (95)

"Safe rule" for whom, we may inquire. Whose safety and whose alone was evidently in the mind of the court. Truly, the rule cannot be frittered away. No matter how negligent the employer may have been, if the employe contributed in *any* (the italics are the court's) degree to the injury, he can get nothing. He must appear before the court of Pennsylvania immaculate, not a speck on his garments, otherwise he cannot recover. We rejoice that of the forty-eight states in the Union no other has such a one-sided rule.

7. In Indiana, "it is the general doctrine, and the settled law of this state that where negligence is the issue, it must be a case of unmixed negligence; that in such case a party cannot recover if it appear that by the want of ordinary care and prudence on his part he contributed to the injury, or if, by the exercise of ordinary care, he might have prevented the injury." (96)

(93) *Trow v. Vt. Central R.*, 24 Vt. 487; *Burge v. Gardiner*, 19 Conn. 507.

(94) *Robinson v. Cone*, 22 Vt. 213, 222.

(95) *Monongahela City v. Fischer*, 111 Pa. 9; *Oil City Supply Co. v. Boundy*, 122 Pa. 449; *Mattimore v. Erie City*, 144 Pa. 14; *Railroad v. Norton*, 24 Pa. 465; *Brown v. Clark*, 14 Pa. 469.

(96) *Terre Haute R. v. Graham*, 95 Ind. 286, 291; *Bellefontaine R. v. Hunter*, 33 Ind. 335; *Higgins v. Jeffersonville R.*, 52 Ind. 110; *St. Louis R. v. Mathias*, 50 Ind. 65; *Jackson v. Indianapolis R.*, 47 Ind. 454.

If the evidence shows that the injury resulted from either of two causes, only one of which was due to the defendant's negligence, no inference can be decisive, and the plaintiff cannot recover because he must make out a positive case. Thus, after a freight train passed through a tunnel a brakeman was found in a dying condition. There were loose timber hanging from the roof, and one theory was that he was struck by one of them; the other theory was that he did not sit down when he came to the tunnel, as he should have done. As there was no positive proof of the cause of his death the negligence of the company was not proved. (97)

8. "When the defence is contributory negligence, the proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary or common care and caution, that but for such negligence or common caution on his part the misfortune would not have occurred. In the first place, the plaintiff would be entitled to recover; in the latter, he would not." (98)

9. When a person is injured and sues his employer to recover, he must make out his case, that the employer was negligent. Can this ever be presumed? In South Carolina the Supreme Court held it could be in a case in which cattle were injured by the engine of a railroad who ran over them. He had done so several times before, and the court thought this presumption clearly arose. (99) An attempt was afterwards made to change the rule, (100) but the court refused to overthrow it. The court declared that the plaintiff having proved that the cattle were killed by the train, the burden of proof was on the railroad to show that its engine had not been negligent.

Is not the presumption even? In other words, there can be no presumption. The law can presume nothing.

When the negligence of a principal and that of another servant produces an injury to another servant the principal is liable therefor. The servant assumes the risk of negligence of his fellow-servant, but not that of his master. (1)

(97) *Hughes v. Cincinnati R.*, 91 Ky. 526.

(98) *Kentucky Central R. v. Thomas*, 79 Ky. 160; v. Hoehl, 12 Bush 41.

(99) *Danner v. South Carolina R.*, 4 Rich. 329.

(100) *Roof v. Railroad Co.*, 45 S. Car. 61.

(1) *Indiana: Boyce v. Fitzpatrick*, 80 Ind. 526.

Massachusetts: Avilla v. Nash, 117 Mass. 318; *Elmer v. Locke*, 135 Mass. 575; *Griffin v. Railroad*, 148 Mass. 143; *Lane v. Atlantic Works*, 111 Mass. 136; *Clark v. Soule*, 137 Mass. 380; *Cayzer v. Taylor*, 10 Gray 274; *Joyce v. City of Worcester*, 140 Mass. 245.

New Jersey: Paulmier v. Railroad, 34 N. J. Law 155.

A servant, however, can not wholly ignore a known defect in the instrumentality provided for him, but is required to exercise care and caution in its use. The degree of care depends on the nature of the defect and the character of the use made of the instrumentality. (2) Therefore, if the instrumentality by which he is required to perform this service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such case the law adjudges the servant guilty of concurrent negligence. (3)

Says the Supreme Court of Missouri: "The question has often been raised, discussed and decided whether a servant can recover for injuries in the use of machinery or appliances known by him to be defective. The non-liability of the master in such cases, however, is properly placed upon the ground of contributory negligence rather than that of assumption of risk. The question is one of contributory negligence which should be submitted to the jury, unless the defect is so glaringly hazardous that the court should declare, as a matter of law, that a person of ordinary prudence would not use it." (4)

When a servant is ordered into a place of danger by his employer, or is doing something by his master's order not in the ordinary course of his employment, there is no assumption of the risk and the master is responsible for any injury sustained by the servant while acting in obedience to the command of the master unless the danger was so manifest that no prudent man would have entered into it, or the servant was guilty of negligence contributory to his own injury. (5)

10. "The question whether a party has been negligent in a particular case, is one of mingled law and fact. It includes two questions, whether a particular act has been performed or omitted; this is a pure question of fact. Whether the performance or omission of this act was a legal duty; this is a pure question of law. The extent of a person's duties is to be determined by a consideration of the circumstances in which he is placed. The law imposes duties upon men according to the circumstances in which they are called to act. When the facts are disputed, the question of negligence is

New York: *Booth v. Railroad*, 73 N. Y. 38; *Cone v. Railroad*, 15 Hun 172, s. c. 81 N. Y. 206.

Ohio: *Pittsburg R. v. Henderson*, 37 Ohio St. 549; *Harrison v. Railroad*, 45 Ohio St. 11.

Wisconsin: *Cowan v. Railroad*, 80 Wis. 284; *Stetler v. Railroad*, 46 Wis. 497 and 49 Wis. 609; *Atkinson v. Goodrich Trans. Co.*, 60 Wis. 141; *Sherman v. Menominee River Lumber Co.*, 72 Wis. 122.

United States: *Grand Trunk R. v. Cummings*, 106 U. S. 700.

(2) *Settle v. St. Louis R. Co.*, 127 Mo. 336, 344.

(3) *Patterson v. Railroad*, 76 Pa. 389.

(4) *Settle v. St. Louis R.* 127 Mo. 336.

(5) *Lucey v. Hanibal Oil Co.*, 129 Mo. 32.

a mixed question of law and fact. The jury must ascertain the facts, and the judge must instruct them as to the rule of law which they are to apply to the facts as they may find them. (6)

"When, however, the direct fact in issue is ascertained by undisputed evidence, and such fact is decisive of the case, a question of law is raised, and the court should decide it. The jury has no duty to perform. The issue of negligence comes within this rule. (7) Questions of care and negligence after the facts are proved must be decided by the court." (8)

11. Some states have attempted to establish another rule that merits consideration. It is an attempt to measure or compare the negligence on both sides, and then award judgment in favor of the least culpable. This doctrine has been scouted at in Pennsylvania, but it has been adopted in Illinois and Georgia and is gaining ground. Such a strong principle of justice underlies it that it commends itself to many; on the other hand, an untrained jury is apt to sport with equitable principles in an extraordinary manner. Such a body of men, with strong likes and dislikes, sympathies and prejudices are quite unable often to weigh and compare evidence; in short, often lack adequate legal fitness to administer justice in such cases. Doubtless, if the administration of the rule were confined to a judge, the courts would regard it with more favor.

And here we stop to remark that one of the reasons why the courts have been so industrious in building up a body of law hedging on every side the rights of employes to recover is their fear of the action of juries. Their inclination to give verdicts in favor of employes is proverbial, and also excessive damages. On the other hand, is it not true that the narrowing of their functions leads directly to this result, that whenever they can get a chance they do not fail to improve it? We have no doubt that if the juries had been more impartial the courts would have been more inclined to keep a wider field open for their inquiry.

Let us, then, turn to this rule of measuring the negligence of both parties. In Jacob's case, (9) Justice Breeze, after reviewing many cases, concludes thus: "It will be seen, from the cases, that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care, as manifested by both parties, for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think,

(6) *Purvis v. Coleman*, 1 Bosw. 321.

(7) *Dascomb v. Buffalo & State Line R.*, 27 Barb. 221.

(8) *Biles v. Holmes*, 11 Ired. (Law) 16; *Avera v. Sexton*, 11 Ired, 247; *Heathcock v. Pennington*, 11 Ired. 640; *Herring v. Wilmington R.*, ... Ired (Law) 402.

(9) 20 Ill. 478.

is that in proportion to the negligence of the defendant, should be measured the degree of care required of the plaintiff—that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover.”

This doctrine, thus announced in Illinois in 1858, has often been re-affirmed by the courts of that state. In a later case, Justice Scott remarked: “Formerly it was the rule, if the negligence of the plaintiff contributed to the injury, however slight, it would bar the action. This rule has been modified by more recent decisions, and it is now the settled law that the plaintiff may recover notwithstanding he may have been guilty of contributory negligence, if his negligence is slight and that of the defendant is gross. It is an essential element to the right of action in all cases, the plaintiff or party injured must himself exercise ordinary care, such as a reasonably prudent man will always adopt for the security of his person or property.” (10) And in a still more recent adjudication the cases were elaborately reviewed by Justice Scholfield, and the rule was applied. (11) This rule also prevails in Georgia.

(10) *Chicago R. v. Lee*, 68 Ill. 576, 580.

(11) *Calumet Iron & Steel Co. v. Martin*, 111' Ill. 358.

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